DOCKET

No. 09-144 *** CAPITAL CASE ***

Title: David Bobby, Warden, Petitioner
v.
Robert J. Van Hook

Docketed: August 4, 2009
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (03-4207)
Decision Date: March 6, 2009

Date	Proceedings and Orders
Mar 27 2009	Application (08A866) to extend the time to file a jurisdictional statement on appeal from June 4, 2009 to August 3, 2009, submitted to Justice Stevens.
Apr 3 2009	Application (08A866) granted by Justice Stevens extending the time to file until August 3, 2009.
Jul 31 2009	Petition for a writ of certiorari filed. (Response due September 3, 2009)
Jul 31 2009	Appendix of Carl S. Anderson, Warden filed.
Aug 29 2009	Brief of respondent Robert J. Van Hook in opposition filed.
Aug 29 2009	Motion for leave to proceed in forma pauperis filed by respondent Robert J. Van Hook.
Sep 9 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 14 2009	Reply of petitioner Carl S. Anderson, Warden filed. (Distributed).
Oct 5 2009	DISTRIBUTED for Conference of October 9, 2009.
Oct 13 2009	DISTRIBUTED for Conference of October 19, 2009.
Oct 26 2009	DISTRIBUTED for Conference of October 30, 2009.
Nov 2 2009	DISTRIBUTED for Conference of November 6, 2009.
Nov 9 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 9 2009	Judgment REVERSED and case REMANDED Justice Alito filed a concurring opinion. Opinion per curiam. (Detached Opinion)

Name	Address	Phone
Attorneys for Petitioner:		
Benjamin C. Mizer	Solicitor General Office of the Ohio Attorney General 30 E. Broad Street, 17th Floor Columbus, OH 43215 benjamin.mizer@ohioattorneygeneral.gov	(614) 466-8980
Party name: Carl S. Anderson, Warden		
Attorneys for Respondent:		
Keith Arthur Yeazel Counsel of Record	5353 North High Street Columbus, OH 43214	(614) 885-2900
Party name: Robert J. Van Hook		

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
09-144 JUL 31 2009
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

ROBERT J. VAN HOOK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

CAPITAL CASE — NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. For purposes of *Strickland v. Washington*, 466 U.S. 668 (1984), should defense counsel's performance be reviewed under professional standards that existed at the time of trial, as the majority of circuits require, rather than under the professional standards now in existence, as is the Sixth Circuit's practice?

2. Does the threshold for finding prejudice under *Strickland* vary depending on the number of statutory aggravating circumstances, as opposed to the weight of the aggravating evidence?

3. Did the Sixth Circuit err in granting the habeas writ on Respondent's ineffective assistance of counsel claim?

LIST OF PARTIES

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Carl S. Anderson. See Fed. R. Civ. P. 25(d).

The Respondent is Robert J. Van Hook, an inmate at the Ohio State Penitentiary.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISION INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. A three-judge panel convicted Van Hook of murder and sentenced him to death 3

B. The state courts denied Van Hook's petition for post-conviction relief and the federal district court denied Van Hook's habeas petition 7

C. After lengthy appellate proceedings, the Sixth Circuit reversed the district court and vacated Van Hook's sentence 8

REASONS FOR GRANTING THE WRIT 9

A. The Sixth Circuit misapplied settled law when it evaluated counsel's performance at a 1985 trial under professional standards developed in 2003 10

1. Counsel's performance must be assessed under professional norms that prevailed at the time of trial 11

2. Counsel's mitigation investigation and presentation were reasonable under *Strickland* 16

a. Counsel presented a full picture of Van Hook's childhood at trial .. 17

b. Counsel's mitigation investigation began well in advance of trial 21

c. Van Hook's affidavits are cumulative of the penalty-phase evidence 22

B. The Sixth Circuit erred by holding that the threshold for prejudice under *Strickland* is lower when the murder implicates one statutory aggravating circumstance 24

1. The *Strickland* prejudice standard does not vary with the number of aggravating circumstances 24

2. Van Hook has not shown prejudice from his counsel's failure to interview the six disputed witnesses .. 27

CONCLUSION 33

TABLE OF AUTHORITIES

Cases **Page(s)**

Brown v. Sanders,
546 U.S. 212 (2006) 25

Brown v. Uttecht,
530 F.3d 1031 (9th Cir. 2008) 14

Cone v. Bell,
359 F.3d 785 (6th Cir. 2004) 13

Cornwell v. Bradshaw,
559 F.3d 398 (6th Cir. 2009) 15

Dickerson v. Bagley,
453 F.3d 690 (6th Cir. 2006) 13, 15, 27

Gray v. Branker,
529 F.3d 220 (4th Cir. 2008) 14

Haliym v. Mitchell,
492 F.3d 680 (6th Cir. 2007) 13

Hamblin v. Mitchell,
354 F.3d 482 (6th Cir. 2003) 12, 13, 15, 27

Hill v. Mitchell,
400 F.3d 308 (6th Cir. 2005) 31

Hummel v. Rosenmeyer,
564 F.3d 290 (3d Cir. 2009) 14

Mapes v. Coyle,
171 F.3d 408 (6th Cir. 1999) 23

Mason v. Mitchell,
543 F.3d 766 (6th Cir. 2008) 27

Miranda v. Arizona,
384 U.S. 436 (1966) 8

Rompilla v. Beard,
545 U.S. 374 (2005) 13, 14, 16

Schriro v. Landrigan,
550 U.S. 465 (2007) 31

Sonnier v. Quarterman,
476 F.3d 349 (5th Cir. 2007) 14

Spisak v. Mitchell,
465 F.3d 684 (6th Cir. 2006), *cert granted*,
129 S. Ct. 1319 (2009) 27

State v. Johnson,
723 N.E.2d 1054 (Ohio 2000) 29

State v. Penix,
513 N.E.2d 744 (Ohio 1987) 25

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

Summerlin v. Schriro,
427 F.3d 623 (9th Cir. 2005) (en banc) 14

Wiggins v. Smith,
539 U.S. 510 (2003) ..... *passim*

Williams v. Taylor,
529 U.S. 362 (2000) 13

Statutes and Rules

Anti-Terrorism and Effective Death Penalty Act
of 1996, 110 Stat. 1219 ..... 8, 13, 23

28 U.S.C. § 1254 1

Ohio Rev. Code § 2929.03 ..... 25, 28

Ohio Rev. Code § 2929.04 ..... 4, 24, 25

Other Authorities

1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980) 16

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, cmt. (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913 (2003) 12

PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of David Bobby, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit panel's opinion, *Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009), is reproduced at App. 1a-15a. The panel's earlier opinions, *Van Hook v. Anderson*, 535 F.3d 458 (6th Cir. 2008), and *Van Hook v. Anderson*, 444 F.3d 830 (6th Cir. 2006), are reproduced at App. 20a-45a and App. 110a-122a. The Sixth Circuit's en banc opinion, *Van Hook v. Anderson*, 488 F.3d 411 (6th Cir. 2007), and en banc order vacating those earlier opinions are reproduced at App. 46a-109a and App. 18a-19a. The United States District Court for the Southern District of Ohio's opinions denying relief are reproduced at App. 123a-213a. The Ohio court of appeals' decision denying Van Hook's petition for post-conviction relief is reproduced at App. 214a-225a. The Ohio Supreme Court's opinion on direct appeal in *State v. Van Hook*, 530 N.E.2d 883 (Ohio 1988), is reproduced at App. 241a-286a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion on March 6, 2009. Justice Stevens extended the time period to file a petition for writ of certiorari to August 3, 2009. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

The Sixth Circuit in this case so mangled the analysis of Respondent Robert J. Van Hook's ineffective assistance of counsel claim that the circuit now stands alone on a question that commonly arises in capital cases. Specifically, in evaluating Van Hook's claim that his trial counsel's investigation of potential mitigating evidence in 1985 was constitutionally inadequate, the appeals court rigidly applied the professional guidelines issued by the American Bar Association in 2003—*eighteen years* after Van Hook's trial. That approach conflicts with numerous decisions from the other circuits—not to mention this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984)—which look to the professional standards in existence at the time of counsel's performance.

Then, on *Strickland*'s prejudice prong, the court committed a second fundamental error, stating that the "threshold for finding prejudice in this case is . . . lower" because Van Hook's murder implicated only one aggravating circumstance under Ohio law. App. 14a. The prejudice inquiry turns, however, not on the number of statutory aggravators, but on "the totality of the evidence" in aggravation and mitigation before the trier of fact. *Strickland*, 466 U.S. at 695. The Sixth Circuit's mechanical

application of the prejudice standard unfairly stacks the deck against the State in cases like Van Hook's (where only one statutory aggravator is at issue) and against the habeas petitioners in other cases (where multiple statutory aggravators are in play).

This is the third time the Sixth Circuit has granted the writ in this case, following two en banc actions. This Court should grant the Warden's petition and reverse the judgment below.

STATEMENT OF THE CASE

A. A three-judge panel convicted Van Hook of murder and sentenced him to death.

Late one night in February 1985, Robert J. Van Hook met David Self at a downtown Cincinnati bar. App. 241a-242a. The two men engaged in conversation and consumed alcohol for two to three hours. App. 242a. Van Hook then agreed to have sex with Self, and the men left for Self's apartment. *Id.*

Once in the apartment, Self began to perform oral sex on Van Hook. App. 276a. Van Hook grabbed Self's neck and strangled him into unconsciousness. App. 242a. He then took a paring knife from the kitchen and stabbed Self in the head behind his ear lobe. *Id.* He also stabbed Self in the neck in an effort to decapitate him. *Id.* He then stabbed Self in the stomach, making an incision from the abdomen up to and over the sternum. *Id.* With Self's body cavity now open, Van Hook stabbed upward a number of times, piercing the liver and the heart. *Id.* He then placed the knife, a cigarette butt, and a small bottle of amyl nitrate into Self's body

cavity in an effort to cover up any fingerprints. App. 242a, 285a.

Van Hook thereafter searched the apartment, including a chest of drawers and a jewelry box. App. 242a. He could not find any money, but found several gold chains and a leather jacket. App. 242a, 278a. Van Hook next went to the kitchen in search of food, but did not see anything of interest. App. 243a. He then smeared the bloody fingerprints in the apartment, turned up the volume on a stereo, and left the scene with the gold chains. App. 243a, 278a.

Van Hook went to the home of a family friend, Robert Hoy, under the guise of recovering from a fight. App. 243a. He ate a large meal, borrowed money, and departed for Florida. *Id.* He then stayed in Fort Lauderdale until his arrest more than a month later. *Id.* That evening, during an interview with two Cincinnati police detectives, Van Hook confessed to the murder. App. 272a-286a. The detectives then transported Van Hook back to Cincinnati.

A grand jury indicted Van Hook for aggravated murder and aggravated robbery. App. 243a. The grand jury further included a death specification that Van Hook committed the murder during an aggravated robbery, and that he was the principal offender. *Id.* (citing Ohio Rev. Code § 2929.04(A)(7)). Van Hook pled not guilty and not guilty by reason of insanity, waived his right to jury trial, and elected to be tried by a three-judge panel. *Id.*

During the guilt phase of the trial, the defense did not contest that Van Hook killed Self. Van

Hook's only witness was a psychiatrist, Dr. Emmett Cooper. Dr. Cooper testified that Van Hook suffered from a borderline personality disorder characterized by impulsive behavior, mood swings, and gender identity problems. Sixth Circuit Joint Appendix ("J.A.") 4211. Although Van Hook suffered no mental illness or mental disease, J.A. 4217, Dr. Cooper testified that he experienced a "drug-induced" "acute break with reality and acute psychosis" at the time of the murder, "result[ing] in a misperception of reality," J.A. 4220. Therefore, Dr. Cooper said, Van Hook "ha[d] difficulty in distinguishing right from wrong." J.A 4224. In response, the State called two mental health experts, Dr. Nancy Schmidtgoessling and Dr. Teresito Alquizola, to attest that Van Hook did not suffer from any mental disease or defect. J.A. 4278-79, 4327-28.

The three-judge panel convicted Van Hook on both counts and the death specification. J.A. 4402-03. With the defense's acquiescence, the panel recessed the proceedings to allow the probation department to prepare a presentence report and to permit the court psychiatric clinic to evaluate Van Hook on issues relating to the penalty phase. J.A. 4404-05.

In her Mitigation Report to the court, Dr. Donna Winter, a clinical psychologist, concluded that "Van Hook was not suffering from any mental disease or defect." App. 377a. Rather, she said that Van Hook was "the product of an unstable, non-nurturant, violent, and chaotic background," and that "his early years were characterized by inadequate parental care," "exposure to physical or sexual violence," and "exposure to substance abuse." *Id.* His behavior was

also consistent with "a borderline personality disorder." App. 370a.

The three-judge panel then convened for the penalty phase. The defense recalled Dr. Cooper and Dr. Schmidtgoessling to testify that, in light of his personality disorder and his alcohol consumption, Van Hook's ability to appreciate the criminality of his conduct was substantially impaired at the time of the murder. J.A. 4440, 4459. The defense also called character witnesses, including Van Hook's father, mother, and aunt. All three testified in detail about Van Hook's childhood, discussing how Van Hook had witnessed physical beatings of his mother, how his father introduced him to drugs at a young age, how he was regularly neglected, and how he attempted suicide on several occasions. App. 307a-367a. The defense also called Dr. Robert Hoy, a family friend, to testify that he had a grandfather-like friendship with Van Hook, that Van Hook enjoyed music and theater, and that Van Hook was never violent with him. J.A. 4533-36.

At the close of the proceedings, the three-judge panel sentenced Van Hook to death. App. 387-306a. In a 29-page opinion, the court concluded that Van Hook's "intentions were crystal clear" on the night of the murder—"to rob the victim." App. 294a-295a. Further, the court noted that, "[s]ince the age of fifteen [Van Hook] had been accousting [sic] and robbing homosexuals and he was intending to do that same thing again." App. 395a. Finally, the court recounted Van Hook's "rational acts designed to avoid detection"—"smudging his bloody fingerprints," "stuffing the knife handle first into the stomach wound," and "his departure from the city." *Id.*

The court then said that this aggravating circumstance outweighed the mitigating factors. Van Hook had presented no credible evidence of mental disease or defect. App. 297a, 301a, 304a. The court "recognize[d] that all of the records in this case . . . indicate the defendant had a very tragic and unfortunate upbringing, with no love or parental guidance, with continual and excessive use of alcohol and other drugs and with constant negative reinforcement of his personality." App. 301a. But, the court said, the fact "that his earlier years were chaotic and he suffered from a significant degree of neglect and abuse . . . cannot excuse his conduct." App. 305a.

On direct review, the Ohio court of appeals and the Ohio Supreme Court affirmed Van Hook's conviction and sentence. See App. 244a, 260a. This Court denied his petition for writ of certiorari. See *Van Hook v. Ohio*, 489 U.S. 1100 (1989).

B. The state courts denied Van Hook's petition for post-conviction relief and the federal district court denied Van Hook's habeas petition.

Van Hook then filed a petition to vacate his sentence in the state common pleas court, asserting 44 different errors. J.A. 1461-1509. He specifically alleged that trial counsel's performance during the penalty phase was ineffective, J.A. 1494, and he offered affidavits from several family members attesting to facts about his troubled childhood, see App. 226a-240a. The court denied all relief, J.A. 2176-2203, and the Ohio court of appeals affirmed, App. 214a-225a. With respect to the ineffective assistance claim, the appellate court concluded that

Van Hook's affidavits were "merely cumulative" of trial counsel's penalty-phase presentation and that Van Hook had not demonstrated prejudice from counsel's purported deficiencies. App. 219a.

In 1995, Van Hook filed his federal habeas petition. J.A. 21-93. Applying the habeas standards that preceded the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1219, the district court denied relief on all claims. See App. 164a-213a (summary judgment); App. 123a-163a (merits).

C. After lengthy appellate proceedings, the Sixth Circuit reversed the district court and vacated Van Hook's sentence.

On appeal, the Sixth Circuit reversed the district court and granted full habeas relief. The panel held that Van Hook's confession should have been suppressed under *Miranda v. Arizona*, 384 U.S. 436 (1966). App. 120a. The Sixth Circuit, sitting en banc, vacated the panel's decision. It concluded that no *Miranda* violation had occurred and returned the case to the panel for consideration of Van Hook's other claims. App. 80a-81a. This Court denied review. See *Van Hook v. Hudson*, 128 S. Ct. 614 (2007).

The Sixth Circuit panel then reversed the district court again, finding that trial counsel's performance during the penalty phase was constitutionally ineffective for three reasons: counsel's mitigation investigation was deficient, counsel erred by failing to secure an independent mental health expert, and counsel improperly requested the preparation of a presentence report.

App. 26a-40a. The panel then directed the district court to issue a conditional writ and vacate Van Hook's death sentence. App. 45a.

The Sixth Circuit, sitting en banc, vacated the panel's second opinion. App. 18a. While the parties were preparing their supplemental briefs, a majority of judges on the en banc court voted sua sponte to return the case to the panel. App. 16a-17a. The majority requested that the panel "delete[] its discussion of counsel's failure to seek an independent mental health expert and the failure of counsel to object to the Presentence Report." App. 2a.

The panel thereafter issued a third opinion, granting habeas relief solely on counsel's allegedly deficient mitigation investigation. It determined that trial counsel failed to uncover "the most important details" of Van Hook's childhood—that he was beaten by his father, that he once witnessed an attempt by his father to kill his mother, and that his mother was committed to a psychiatric hospital when he was four years old. App. 9a. The panel next determined that the "threshold for finding prejudice in this case is . . . lower" because Van Hook's murder implicated only one aggravating circumstance under Ohio law. App. 14a. Therefore, it stated that "the introduction of more available mitigating evidence could certainly have tipped the scales in favor of his life." App. 13a-14a.

REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition and reverse the Sixth Circuit's grant of the writ—the third such grant in this case—for two reasons. First, as it has done in prior cases, the Sixth Circuit

reviewed counsel's performance in 1985 under professional standards issued by the American Bar Association nearly twenty years later, in 2003. The court's reliance on later-developed ABA guidelines ignores this Court's instruction "to evaluate the conduct from counsel's perspective at the time," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and it creates a division of authority with other federal appellate courts, which consider only those ABA guidelines in effect at the time of counsel's representation.

Second, the Sixth Circuit held that the threshold for finding *Strickland* prejudice in this case was lower because Van Hook's murder implicated only one statutory aggravating circumstance. In Ohio, however, the sentencing decision is guided by the weight of the aggravating evidence, not the number of statutory aggravating circumstances. The *Strickland* prejudice inquiry likewise focuses on the evidence in aggravation, reweighing it against the evidence in mitigation. *Id.* at 695. By suggesting that the threshold for prejudice waxes and wanes with the number of statutory aggravators, the Sixth Circuit has skewed its inquiry in favor of petitioners like Van Hook who are convicted on one aggravator, and against other petitioners who are convicted of multiple aggravators.

A. The Sixth Circuit misapplied settled law when it evaluated counsel's performance at a 1985 trial under professional standards developed in 2003.

A claim of ineffective assistance is reviewed under the familiar framework of *Strickland v.*

Washington. The petitioner must show that counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. The standard of "reasonableness," however, is measured "under *prevailing* professional norms." *Id.* (emphasis added). "[T]o eliminate the distorting effects of hindsight," the habeas court must conduct its inquiry "from counsel's perspective at the time." *Id.* at 689.

Instead of reviewing counsel's performance under the prevailing professional norms in 1985, the Sixth Circuit followed its own precedent and reviewed counsel's performance under 2003 ABA Guidelines. This approach ignores *Strickland*, defies clear pronouncements from this Court, and conflicts with decisions from the other federal appellate courts. When the proper inquiry is taken and the appropriate deference is given to the factual findings of the Ohio post-conviction courts, it is clear that trial counsel's penalty-phase performance was constitutionally adequate. This Court should grant review to correct the Sixth Circuit's hindsighted approach to reviewing Sixth Amendment claims.

1. Counsel's performance must be assessed under professional norms that prevailed at the time of trial.

The Sixth Circuit began its analysis with the proposition that "counsel in death cases should follow closely the ABA standards." App. 6a. The court further stated that this Court has "incorporat[ed] the American Bar Association Guidelines . . . as the professional standard of performance." App. 4a (citing *Wiggins v. Smith*, 539 U.S. 510 (2003)).

The Sixth Circuit then invoked the 2003 ABA Guidelines to review the adequacy of counsel's performance in 1985. For instance, the court said that counsel must "'locate and interview the client's family members . . . and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others.'" App. 8a (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, cmt. (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1024 (2003)). The court cited to other ABA commentary calling for an "'unparalleled investigation into [the defendant's] personal and family history,' as well as school, medical and psychological records." App. 9a (quoting ABA Guidelines 10.7, cmt.).[1] But these guidelines did not exist in 1985. In fact, the ABA did not issue its standards for death-penalty representation until 1989—four years after the trial in this case.

This approach—applying later-developed ABA standards to evaluate the adequacy of counsel's performance—is established practice in the Sixth Circuit. In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), the court granted habeas relief after concluding that counsel's performance at a 1984 murder trial was deficient under the 1989 and 2003 ABA Guidelines. The court explained that, "[a]lthough the instant case was tried before the 1989 ABA edition of the standards was published,

---

[1] The Sixth Circuit's opinion did not identify the edition of the ABA Guidelines, but an examination of the different versions establishes that the court's quoted passages were taken from the 2003 Guidelines.

the standards merely represent a codification of longstanding common-sense principles of representation understood by diligent, competent counsel in death penalty cases." *Id.* at 487. And the 2003 Guidelines were also applicable to the case, the court said, because they "simply explain[ed] in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence." *Id.*

The Sixth Circuit has applied *Hamblin* to its later habeas cases, including to those cases governed by AEDPA. See, e.g., *Haliym v. Mitchell*, 492 F.3d 680, 716-17 & n.28 (6th Cir. 2007); *Dickerson v. Bagley*, 453 F.3d 690, 693-94 (6th Cir. 2006); see also *Cone v. Bell*, 359 F.3d 785, 804 n.2 (6th Cir. 2004) (Merritt, J., concurring) ("Although the above quotation is a recent statement not published at the time of Cone's trial, I use it because it is an articulation of long-established 'fundamental' duties of trial counsel.").

The Sixth Circuit's framework for identifying the "prevailing professional norms" of representation departs from this Court's clear teachings. *Strickland*, 466 U.S. at 688. When judging ineffective assistance claims, the Court has looked to the ABA standards in effect at the time of the challenged conduct. First, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court cited to the 1980 ABA standards in finding that counsel's mitigation efforts in 1986 were deficient. *Id.* at 396. Then, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court reviewed the adequacy of counsel's mitigation investigation in 1989 under the 1989 ABA Guidelines. *Id.* at 524. Finally, in *Rompilla v. Beard*, 545 U.S. 374 (2005),

the Court assessed counsel's performance in 1988 under "the American Bar Association Standards for Criminal Justice in circulation"—specifically, standards from 1982. *Id.* at 387. Although *Rompilla* referenced the ABA's 1989 and 2003 guidelines in footnotes, it did so simply to point out that the professional standards at issue in that case had not changed over the years. *Id.* at 387 n.6 & n.7.

The other federal appellate courts likewise have understood that only those ABA standards and guidelines in existence "[a]t the time at issue" are relevant to the *Strickland* inquiry. *Hummel v. Rosenmeyer*, 564 F.3d 290, 298 (3d Cir. 2009); accord *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008); *Sonnier v. Quarterman*, 476 F.3d 349, 358 n.3 (5th Cir. 2007). Under that straightforward approach, the habeas court identifies the "clearly described" duties from the "[ABA] standards in effect at the time of [the petitioner's] trial," and then evaluates defense counsel's performance using those metrics. *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc); see also *Brown v. Uttecht*, 530 F.3d 1031, 1040 (9th Cir. 2008) (Reinhardt, J., dissenting) (assessing counsel's penalty-phase performance under "the ABA Guidelines at the time of trial"). No other circuit has adopted the Sixth Circuit's practice of using later-developed ABA guidelines to judge the propriety of counsel's representation.

The Sixth Circuit's misapplication of the *Strickland* inquiry is all the more troubling given its lofty treatment of the ABA Guidelines. Time and again, this Court has emphasized that the Guidelines "are only guides" "to determining what is reasonable." *Strickland*, 466 U.S. at 688; accord

Wiggins, 539 U.S. at 524. Yet the Sixth Circuit consistently elevates the Guidelines to the status of constitutional requirements: "'Our Court has made clear that . . . counsel for defendants in capital cases must fully comply with [the ABA Guidelines].'" App. 6a-7a (quoting *Dickerson*, 453 F.3d at 693) (alterations in original); accord *Cornwell v. Bradshaw*, 559 F.3d 398, 407 (6th Cir. 2009); *Hamblin*, 354 F.3d at 486 ("[T]he ABA standards for counsel . . . provide the guiding rules and standards . . . .").

Trial counsel's performance is now scrutinized in the Sixth Circuit to the letter of the current ABA standards, even if, as here, the standards were issued decades after the disputed criminal proceedings. Such an approach amplifies, rather than "eliminate[s,] the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. After all, the 2003 ABA Guidelines on death-penalty representation include detailed instruction, commentary, and citations to authority—none of which was available in 1985. Given the many developments in the law and the profession over the past two decades, reviewing the performance of counsel at a 1985 trial under modern-day standards may throw into question the effectiveness of many performances that were perfectly reasonable at the time.

The Warden therefore asks that the Court accept review and restore the *Strickland* inquiry to its proper form: "the reasonableness of counsel's challenged conduct" is to be judged "as of the time of counsel's conduct." *Id.* at 690.

2. Counsel's mitigation investigation and presentation were reasonable under *Strickland*.

On the merits of Van Hook's ineffective assistance claim, the question is whether "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." 466 U.S. at 688. Like all attorneys, Van Hook's trial counsel "ha[d] a duty to make reasonable investigations" into the facts and circumstances of the case, *id.* at 691, but that duty is not unlimited. Counsel "may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 382. And there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Furthermore, at the time of Van Hook's trial in 1985, the ABA had not yet developed detailed guidelines for representation in capital cases. And the ABA's criminal justice standards were broad and nondescript. Defense attorneys had a general duty "to explore all avenues leading to facts relevant to the merits of the case and the penalty." 1 ABA Standards for Criminal Justice 4-4.1, at p. 4-53 (2d ed. 1980). The standards further stated that "[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant." *Id.* at p. 4-55. They offered no guidance, direction, or strategy for collecting, and then presenting, mitigating evidence to the factfinder in a capital case.

In this case, the Sixth Circuit found that "counsel's investigation into and presentation of mitigating evidence was deficient" for three reasons: (1) counsel failed to uncover and present "many of the most important details" of Van Hook's "traumatic childhood experience"; (2) counsel waited until "after the guilt phase" to "start[] a last minute investigation for the mitigation hearing"; and (3) counsel failed to contact and interview other family members who "could have helped . . . counsel narrate the true story of Van Hook's childhood experiences." App. 9a, 10a, 11a. A review of the trial record shows the opposite: counsel's penalty-phase investigation and performance were consistent with the professional norms of the day.

a. Counsel presented a full picture of Van Hook's childhood at trial.

With respect to the first alleged deficiency, the Sixth Circuit concluded that Van Hook's attorneys uncovered and presented "little information about [Van Hook's] traumatic childhood." App. 9a. To the contrary, counsel presented extensive details on this subject.

Van Hook's father, Robert Van Hook, Sr., testified that he "was always fighting" with his wife, physically and verbally, in front of Van Hook. App. 309a. He said that he came home drunk "[a]bout every night of the week" when Van Hook was a toddler, App. 311a; that he frequently "took [Van Hook] to bars" until "3 o'clock, 4 o'clock in the morning" beginning at age nine, App. 311a-312a; and that he introduced his son to amphetamines at age eleven, App. 312a. Van Hook, Sr. also reported that his son had no stable home or living situation, App.

314a-315a, and that he had trouble in school, App. 316a. Van Hook, Sr. admitted that, when his son was fifteen, he "accused him of going to bed with my girlfriend." App. 318a. At this point, Van Hook ran away, living on the streets for several months. *Id.* Finally, Van Hook, Sr. referenced an incident where he "slapped the hell out of" his son, App. 321a, and described an occasion where his son attempted suicide by cutting his arm, App. 327a.

Van Hook's mother, Joyce Lavern Lauttrell, testified that Van Hook's father beat her "[e]very week almost," App. 338a, and that Van Hook often watched, App. 339a. Lauttrell stated that she was a heavy drinker during Van Hook's childhood, App. 339a, 341a; that she had been divorced three times, App. 340a; that Van Hook never attended a school for longer than a year, App. 342a-343a; and that Van Hook used drugs with his father, App. 343a. Lauttrell noted that Van Hook had joined the military at age 17. App. 344a. He thereafter attempted suicide, and was ultimately discharged due to his drug and alcohol addictions. App. 346a-347a. After describing Van Hook's several other attempts at suicide, App. 351a-353a, Lauttrell broke down, lamenting that "his father and I ought to be on trial with him." App. 353a. She said, "So many things I wish I could do over again, but I can't, and I feel just as much to blame for what happened." *Id.*

One of Van Hook's aunts, Marilyn Johnson, confirmed that Van Hook's childhood was "a bad one, one that kids should never have." App. 358a. Johnson stated that Van Hook's mother and father "fought an awful lot" and "drank an awful lot," *id.*, and that Van Hook and his mother would often stay

with her after the fights, App. 360a. Johnson also reported that Van Hook lived with her for a year when he was eleven due to his parents' "fighting," "drinking," and "partying." App. 362a. And, Johnson said, Van Hook was "like [her] oldest son" when he was with her family, but he became a "different boy" after being with his father. App. 362a-363a.

These fact witnesses were buttressed by the testimony of medical experts. Dr. Schmidtgoessling testified that Van Hook "had one of the most unfortunate histories one could have." J.A. 4274. She noted that "[b]oth parents were substance abusers," that "the father was quite violent," and that the family unit was "a most unstable situation." *Id.* Dr. Alquizola recounted a similar childhood of "a lot of fights, a lot of violence, and no stability." J.A. 4332. And Dr. Winter described Van Hook's childhood as "very much like a 'combat zone.'" App. 371a. His father was "abusive" and "a drug user," his mother drank "heavily," and Van Hook "observed numerous episodes of violence," including "sexual violence," during his childhood. App. 370a-371a. Dr. Winter indicated that Van Hook's father would "grab [his mother] by her hair and swing her around the room, hold her at gun point, [and] hold her at knife point." App. 371a.

Even with this presentation, the Sixth Circuit inexplicably found that counsel failed to uncover and present "the most important details" of Van Hook's childhood. App. 9a. Referencing an affidavit by Van Hook's stepsister, Tanna Waller, the court said that "counsel's investigation failed to reveal that Van Hook's parents repeatedly beat him" and that Van

Hook "had witnessed his father attempt to kill his mother several times." *Id.* (citing App. 232a). The trial transcript contradicts that statement. As discussed above, Van Hook, Sr.'s violent behavior toward his family was well documented at the penalty phase. And Van Hook's mother testified that her son regularly watched her being beaten, see App. 338a-339a—a statement corroborated by Dr. Winter's report, see App. 371a.

The court also criticized counsel for failing to learn that Van Hook's "mother was committed to a psychiatric hospital when [Van Hook] was between four and five years old." App. 9a (citing App. 227a). Again, the record shows otherwise.[2] Van Hook's counsel were aware of Joyce Lauttrell's psychiatric history. Her psychiatrist had contacted counsel by letter, see App. 230a, and Lauttrell testified that she had been "under psychiatric care" at one point during Van Hook's childhood, App. 340a. Moreover, counsel cannot be faulted for not focusing their presentation on this topic. There was no credible evidence that Van Hook himself suffered from a mental disease or defect, and there is no evidence in the record to explain how Lauttrell's psychiatric hospitalization affected Van Hook's childhood, if at all.

---

[2] Van Hook's affidavits are inconsistent on when Joyce Lauttrell was hospitalized. Van Hook's uncle stated that Lauttrell was committed when Van Hook was four or five years old, see App. App. 227a, but Van Hook's aunt stated that Lauttrell was committed before Van Hook was even born, see App. 239a.

b. Counsel's mitigation investigation began well in advance of trial.

With respect to the second alleged deficiency, the Sixth Circuit questioned the timing of counsel's mitigation efforts. See App. 10a. The court stated that Van Hook's attorneys waited "until four days before the mitigation hearing to begin the[ir] investigation." App. 12a. That assertion has no support. The Sixth Circuit's one citation to the record, App. 10a (citing J.A. 4400-04), contains no information about counsel's investigation. Rather, it is an excerpt from the trial transcript where the three-judge panel reads its guilt-phase verdict and defense counsel then agrees to the preparation of a presentence report and mental-status evaluation.

Billing records establish that counsel's penalty-phase preparations began much earlier. Van Hook was indicted on April 18, 1985, and the case went to trial on July 15, 1985. J.A. 357, 567. Van Hook's attorneys had numerous conversations with Joyce Lauttrell starting in late April. App. 380a, 385a. Counsel reviewed Van Hook's military records on May 13, 1985, App. 380a, and they met with the Veterans Administration on May 28, 1985, about Van Hook's medical records, App. 381a, 386a. One of the attorneys placed a call on June 7, 1985, to a "mitigation expert." App. 386a. And both attorneys had meetings with Van Hook's penalty-phase witnesses—his parents, Marilyn Johnson, and Robert Hoy—in early July. App. 381a-382a, 386a-387a. In light of these billing notations, the Sixth Circuit was wrong to characterize counsel's investigation as "last minute," beginning only "after the guilt phase" had ended. App. 10a.

c. Van Hook's affidavits are cumulative of the penalty-phase evidence.

With respect to the third alleged deficiency, the Sixth Circuit found that counsel were ineffective because they failed to interview "Van Hook's step-sister, his paternal uncle, two of his paternal aunts, his maternal uncle, and the psychiatrist who treated his mother." App. 11a. "Considering the information that they had already learned," the court stated that Van Hook's attorneys "had reason to suspect that much worse details existed," and that these individuals could "narrate the true story of Van Hook's childhood." *Id.*

The Ohio court of appeals examined the affidavits from these family members and found that they were "merely cumulative" of the trial testimony. App. 219a. A review of these documents validates the state court's assessment. Three affidavits contain little to no facts pertaining to Van Hook's childhood. See App. 229a-230a (Warren Richards); App. 233a-234a (Billy Van Hook); App. 238a-240a (Frieda Roll). The other affidavits contain short, nondescript statements. For instance, an uncle, Robert Leon Salyers, stated that Van Hook's parents "argued a lot," that "Joyce [Lauttrell] was always spanking" Van Hook, and that Van Hook, Sr. "was hard" on his son. App. 227a-228a. Van Hook's stepsister, Tanna Waller, stated that Van Hook's parents "would drink heavily" and get into "loud arguments and physical fights." App. 231a. She further attested that Van Hook, Sr. "on different times tried to kill Mom," and that "[h]e would hit [Van Hook] with his hand or fist on the head"

beginning at age three. App. 232a. And an aunt, Darlene Van Hook Whitson, reported that Van Hook's parents "would whip him" if he cried, that "they did not want to be bothered by the children," and that they got into "many verbal fights." App. 236a. She also said that Van Hook "began skipping school in the first grade." *Id.* The same or substantially similar information was presented during the penalty phase; as explained above, the three-judge panel was well aware of Van Hook's turbulent upbringing, his parents' addictions, and his father's penchant for violence.

The Sixth Circuit's analysis is all the more problematic given the standard of review. Even before AEDPA, factual determinations made by a state court were presumed correct on federal habeas review. See *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999). In this case, the Ohio court of appeals reviewed the record and concluded that Van Hook's affidavits were cumulative of the trial evidence. The Sixth Circuit should have deferred to that reasonable assessment.

Both the state court and the district court found that counsel's mitigation investigation and presentation was constitutionally adequate. Only by measuring counsel's performance under ABA guidelines adopted eighteen years later and misreading the relevant facts in the trial record, could the Sixth Circuit say otherwise.

B. The Sixth Circuit erred by holding that the threshold for prejudice under *Strickland* is lower when the murder implicates one statutory aggravating circumstance.

Even if trial counsel's penalty-phase investigation and performance were deficient, Van Hook must still show prejudice—that is, he must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The Sixth Circuit's prejudice analysis is rife with error. The court incorrectly held that, as a legal matter, the standard for prejudice under *Strickland* is lower when the murder implicates only one statutory aggravating circumstance. And when conducting its analysis, the court failed even to mention, much less weigh, the strength of the aggravating evidence in this case. Instead, it granted relief based on six untested affidavits that were either irrelevant to or cumulative of the mitigation evidence presented at the trial.

1. The *Strickland* prejudice standard does not vary with the number of aggravating circumstances.

When outlining the framework of its prejudice inquiry, the Sixth Circuit focused on the fact that Van Hook's murder "only qualified for one of Ohio's statutory aggravating circumstances"—that he committed the murder during an aggravated robbery and that he was the principal offender. App. 13a (citing Ohio Rev. Code § 2929.04(A)(7)). And because Van Hook was convicted of only one aggravating

circumstance, the court concluded, "[t]he threshold for finding prejudice . . . is lower." App. 14a.

The Sixth Circuit was wrong to suggest that the number of aggravating circumstances affects the *Strickland* prejudice inquiry. Under Ohio's death-penalty statute, the State must present its aggravating evidence in certain statutorily defined categories. See Ohio Rev. Code § 2929.04(A)(1)-(8) (1981). The sentencer then weighs those aggravating circumstances against the mitigating evidence to determine whether the death penalty is appropriate. See Ohio Rev. Code § 2929.04(B) (1981); *State v. Penix*, 513 N.E.2d 744, 746 (Ohio 1987). It is the *weight* of the aggravating circumstance (or circumstances), not their *number*, that guides the ultimate decision. See Ohio Rev. Code § 2929.03(D)(2) & (D)(3) (1981) (directing the jury or three-judge panel to impose a death sentence if it "unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances . . . outweigh the mitigating factors"); see also *Penix*, 513 N.E.2d at 746 ("This weighing process is designed to guide the sentencing authority's discretion by focusing on the 'circumstances of the capital offense and the individual offender.'") (citation omitted).

This Court has also recognized the distinction. In *Brown v. Sanders*, 546 U.S. 212, 214 (2006), a jury sentenced the defendant to death after finding four aggravating circumstances. On appeal, the California courts declared two of the circumstances invalid, but nevertheless affirmed the death sentence. *Id.* at 214-15. On habeas review, the Ninth Circuit vacated the death sentence, but this Court reversed. The jury's consideration of two

invalid aggravating factors did not give rise to a constitutional defect, the Court said, because "[a]ll of the aggravating facts and circumstances that the invalidated [aggravating] factor permitted the jury to consider were also open to their proper consideration under one of the other [aggravating] factors." *Id.* at 223. Or stated differently, the fact that the jury was allowed to consider two invalid aggravating factors was harmless; "the universe of aggravating *facts*" in the case would have been the same regardless of the number of aggravating *factors*. *Id.* at 222 (emphasis added).

The *Strickland* prejudice inquiry fully incorporates this focus on aggravating evidence, as opposed to aggravating factors. The habeas court looks to "the totality of the evidence" that would have been before the judge or jury but for counsel's errors. *Strickland*, 466 U.S. at 695. It then "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence" to determine whether the petitioner was prejudiced. *Wiggins*, 539 U.S. at 534.

The Sixth Circuit's belief that "[t]he threshold for finding prejudice" depends on the number of statutory aggravating circumstances in a case is not only wrong, but it mangles the *Strickland* inquiry. In some cases, including this one, the Sixth Circuit's number-of-aggravators analysis will tilt unfairly against the State. Here, for instance, because Van Hook's "conviction only qualified for one of Ohio's statutory aggravating circumstances," the Sixth Circuit found that "the introduction of more available mitigating evidence could certainly have tipped the scales in favor of his life." App. 13a-14a.

In other habeas cases, however, the Sixth Circuit's rule will unfairly tilt the scales against the petitioner, for a court might think that the prejudice hurdle is more rigorous if the crime implicated several aggravating circumstances. But there is only one prejudice standard, and it applies equally to all habeas petitioners.

2. Van Hook has not shown prejudice from his counsel's failure to interview the six disputed witnesses.

Under a straightforward application of *Strickland*, Van Hook has not established "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. The Sixth Circuit's contrary determination ignored the State's strong evidence in aggravation and recited untested affidavit evidence that was either irrelevant to or cumulative of the mitigation evidence at trial.

Although the prejudice inquiry directs courts to "reweigh" the aggravating and mitigating evidence, *Wiggins*, 539 U.S. at 534, the Sixth Circuit failed to mention, much less reweigh, the aggravating evidence here. This occurrence is not uncommon; the Sixth Circuit often finds prejudice without any consideration of whether, in light of the aggravating evidence, the petitioner's mitigation arguments had a reasonable chance at success. See, e.g., *Mason v. Mitchell*, 543 F.3d 766, 780-81 (6th Cir. 2008), *petition for cert filed* (U.S. July 20, 2009) (No. 09-74); *Spisak v. Mitchell*, 465 F.3d 684, 706 (6th Cir. 2006), *cert granted*, 129 S. Ct. 1319 (2009); *Dickerson*, 453 F.3d at 699; *Hamblin*, 354 F.3d at 493.

To that question, the factfinder must consider "any evidence raised at trial that is relevant to the aggravating circumstances"—specifically, Van Hook's aggravated robbery of David Self. Ohio Rev. Code § 2929.03(D)(1) (1981). And here, the State had a strong case. As recounted above, Van Hook lured David Self to an apartment with the specific intent of robbing him. Once there, Van Hook waited until Self was in a vulnerable position, choked him into unconsciousness, and killed him. Van Hook then searched the apartment for valuables, smudged his fingerprints, and placed the knife in Self's body cavity in an effort to conceal his identity. Furthermore, the trial evidence established that Van Hook had a long history of luring gay men under the pretenses of sex, assaulting them, and then robbing them. See, e.g., App. 374a; J.A. 4276-77, 4334. Van Hook also admitted that he continued this behavior in the weeks after the murder: "I been goin' down to the main strip an' bout once uh week I'd go down there an' lure uh homosexual to the room an' . . . I uh assulted [*sic*] uh couple guys, took their money." App. 279a. As the three-judge trial panel found when reviewing the aggravating evidence, Van Hook's "modus operandi was clear." App. 295a.

As to the mitigation side of the inquiry, the Sixth Circuit stated that "[c]ounsel's deficient performance prevented the three-judge panel from learning fully about the two statutory mitigating factors that were the strongest in his case—his traumatic family background and his mental illness." App. 13a. This holding is erroneous for three reasons.

First, the Sixth Circuit had no evidentiary basis for characterizing Van Hook's mental-illness arguments as strong. Although multiple experts testified that Van Hook had a borderline personality disorder, not one concluded that Van Hook suffered from a mental disease or defect that impaired his capacity to appreciate the criminality of his conduct, J.A. 4439, 4459—a finding that Dr. Winter reached as well, see App. 377a. The most they could say is that Van Hook had impaired judgment on the night of the murder due to a confluence of drugs, alcohol, and his personality disorder, J.A. 4439—a theory that the three-judge panel reasonably chose not to credit in mitigation, App. 301a-304a; see generally *State v. Johnson*, 723 N.E.2d 1054, 1078 (Ohio 2000) (observing that defendant's "personality disorder and drug dependence[] are entitled to some, but very little, weight in mitigation").

Van Hook's affidavits provide no new support for his claims of mental illness. Dr. Warren Richards stated that he treated Joyce Lauttrell in 1972 for depression and suicidal feelings. App. 229a. Dr. Richards speculated that psychological disorders run in the Van Hook family, but he offered no information or diagnosis about Van Hook's mental state (since he never treated him). App. 230a. And the affidavits from Van Hook's family members are devoid of any suggestion that Van Hook suffered from, or was treated for, mental illness during his childhood.

Second, the Sixth Circuit mistakenly stated that, but for counsel's deficiencies, the three-judge panel would have learned certain facts about Van Hook's childhood—that he was physically abused,

that he watched his father try to kill his mother on several occasions, and that his mother was once committed to a psychiatric hospital. But all these facts were presented at trial through the penalty-phase testimony and Dr. Winter's report. As discussed above, the three-judge panel was well aware that Van Hook's "earlier years were chaotic" and that "[Van Hook] suffered from a significant degree of neglect and abuse." App. 305a.

Van Hook's cursory affidavits add little insight into his childhood. One of Van Hook's uncles attested that "Joyce was always spanking [him]," and "[his father] was hard on him." App. 227a-228a. One of Van Hook's aunts stated that Van Hook's parents "would whip him" if he cried and "would unexpectedly leave [Van Hook] at the Bar." App. 236a. And Van Hook's stepsister said that she saw Van Hook's father "hit [him] with his hand or fist on the head . . . for trivial things." App. 232a. The two other affidavits are silent about Van Hook's childhood, offering only generalized descriptions of the family's history. The Ohio court of appeals correctly determined that these "evidentiary documents" did not "demonstrat[e] prejudice." App. 219a. Nothing in these cursory statements "alter[ed] the entire evidentiary picture" of Van Hook's childhood painted at trial in such a way as to undermine the three-judge panel's sentencing decision. *Strickland*, 466 U.S. at 696.

Third, the Sixth Circuit reasoned that, had Van Hook's attorneys sought out these additional family members, the three-judge panel "would have heard additional 'first-hand accounts from those who knew Van Hook best.'" App. 13a (citation and alteration

omitted). This assertion blindly assumes that these individuals would have testified at trial if asked. But unlike their fellow family members, two of the affiants—Billy Van Hook and Darlene Van Hook Whitson—did not state that they would have testified at Van Hook's trial if asked. App. 234a, 237a. And a third affiant, Robert Leon Salyers, said that Van Hook "was a hot head" with "a very bad temper." App. 228a. Given that statement, a defense attorney might not have wanted Salyers as a mitigation witness.

But even if these individuals would have testified at trial, they would have provided not different, but "*additional* 'first-hand accounts'" of Van Hook's childhood. App. 13a (emphasis added). This is insufficient to show prejudice under *Strickland*, as "the new evidence . . . must *differ* in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (emphasis added).

As a final matter, even if the affidavits contain sufficient facts to "entitle [Van Hook] to federal habeas relief" on his ineffective assistance claim (and they did not), the proper remedy is a remand to the district court with instructions "to grant an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). The state courts and the district court summarily dismissed Van Hook's requests for post-conviction relief on this ground. Therefore, his affidavits have never been subjected to adversarial testing. Instead of ordering an evidentiary hearing, however, the Sixth Circuit took the dramatic step of

granting habeas relief on the basis of unproven facts in those affidavits.

The Warden is aware of no authority countenancing the issuance of the writ before the petitioner has established the facts essential to his claim. Then again, the Warden has located no support for the Sixth Circuit's novel approach to assessing the adequacy of trial counsel's performance or the likelihood of prejudice in this case. Simply put, every aspect of the Sixth Circuit's analysis contradicts the well-established standards announced in *Strickland*. The ruling below should be corrected, lest it be applied to the multitude of penalty-phase ineffective assistance claims now pending before the Sixth Circuit.

CONCLUSION

For the above reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

July 31, 2009

APPENDIX

Supreme Court, U.S.
FILED

(2)

09-144 JUL 31 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

ROBERT J. VAN HOOK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner,
David Bobby, Warden

TABLE OF CONTENTS

Page

Federal Habeas Proceedings

Appendix A: Amended Opinion, United States Court of Appeals for the Sixth Circuit, March 6, 2009 ..... 1a

Appendix B: Order, United States Court of Appeals for the Sixth Circuit (en banc), February 12, 2009 ..... 16a

Appendix C: Order, United States Court of Appeals for the Sixth Circuit (en banc), December 18, 2008 ..... 18a

Appendix D: Opinion, United States Court of Appeals for the Sixth Circuit, August 4, 2008 ..... 20a

Appendix E: Opinion, United States Court of Appeals for the Sixth Circuit (en banc), May 24, 2007 ..... 46a

Appendix F: Opinion, United States Court of Appeals for the Sixth Circuit, April 18, 2006 ..... 110a

Appendix G: Opinion and Order, United States District Court for the Southern District of Ohio, Eastern Division, August 7, 2003 ..... 123a

Appendix H: Opinion and Order, United States District Court for the Southern District of Ohio, Eastern Division, March 28, 2002 ..... 164a

State Post Conviction Review

Appendix I: Decision, Ohio Court of Appeals, First Appellate District, October 21, 1992 ..... 214a

Appendix J: Selected Exhibits to Amended Petition to Vacate or Set Aside Sentence: R.C. Section 2953.21, March 8, 1990

Affidavit of Robert Leon Salyers 226a

Affidavit of Warren Richards, M.D. 229a

Affidavit of Tanna Waller 231a

Affidavit of Billy Van Hook 233a

Affidavit of Darlene Van Hook Whitson 235a

Affidavit of Frieda Roll 238a

Trial Proceedings and Direct Review

Appendix K: Decision, Ohio Supreme Court, November 9, 1988 ..... 241a

Appendix L: Opinion, Hamilton County Common Pleas Court, August 8, 1985 ..... 287a

Appendix M: Trial Testimony of Robert Van Hook, Sr. 307a

Appendix N: Trial Testimony of Joyce Laverne Lauttrell 335a

Appendix O: Trial Testimony of Marilyn Johnson 356a

Appendix P: Court Report of Donna Winter, Ph.D., July 30, 1985 ..... 368a

Appendix Q: Application, Entry and Certification for Assigned Counsel Fees

Richard Bell, August 16, 1985 ..... 379a

W. Stewart Mathews, August 12, 1985 ..... 384a

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0086a.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-4207

ROBERT J. VAN HOOK,

Petitioner-Appellant,

v.

CARL S. ANDERSON, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 94-00269—George C. Smith, District Judge.

Argued: December 6, 2005

Decided and Filed: March 6, 2009

Before: MERRITT, MARTIN, and MOORE,
Circuit Judges.

COUNSEL

ARGUED: James D. Owen, THE OWEN LAW FIRM, Columbus, Ohio, Keith A. Yeazel, Columbus,

Ohio, for Appellant. Stephen E. Maher, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee. **ON BRIEF:** Keith A. Yeazel, Columbus, Ohio, James D. Owen, THE OWEN LAW FIRM, Columbus, Ohio, for Appellant. Stephen E. Maher, Charles L. Wille, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee.

AMENDED OPINION

MERRITT, Circuit Judge. At the request of the majority of the *en banc* court and in order to avoid the need for an *en banc* rehearing, the original panel amends its opinion of August 4, 2008, by deleting its discussion of counsel's failure to seek an independent mental health expert and the failure of counsel to object to the Presentence Report. Therefore, the sole basis for the issuance of the writ of habeas corpus is counsel's failure to investigate mitigating factors. This is an appeal in an Ohio death penalty case by the prisoner, Van Hook, seeking habeas corpus relief under 28 U.S.C. § 2254. On the evening of February 18, 1985, petitioner Robert Van Hook arrived at a bar frequented by male homosexuals in Cincinnati, Ohio. He left the bar with David Self, and the two proceeded to Self's apartment. Once there, Van Hook strangled Self to the point of unconsciousness. He then brutally killed Self, stabbing him several times in the head and abdomen. After stealing a few items from Self's apartment, Van Hook fled to Florida, where he was

apprehended over a month later and subsequently confessed to the murder.[1]

Back in Ohio, Van Hook waived his rights to a trial by jury, and he pleaded not guilty and not guilty by reason of insanity. The three-judge panel, elected under Ohio law, rejected this defense and found him guilty of aggravated murder and aggravated robbery, which made him eligible for the death penalty under Ohio Rev. Code Ann. § 2929.04(A) (West 2008). Finding that the mitigating evidence did not outweigh the aggravators, the three-judge panel imposed the death penalty instead of life imprisonment.

Though he did not deny killing Self, Van Hook asserted unsuccessfully a variety of errors both on direct appeal and in state post-conviction proceedings. *See State v. Van Hook*, 530 N.E.2d 883 (Ohio 1988), *cert. denied*, 489 U.S. 1100 (1989). After exhausting all of his state court remedies, Van Hook sought a writ of habeas corpus in federal district court.

The district court denied the petition on all asserted claims of error. Our panel then reversed the judgment of the district court because under *Edwards v. Arizona*, 451 U.S. 477 (1981), Van Hook's confession to the Cincinnati Police should have been suppressed. We pretermitted all other remaining

---

[1] For a more detailed recitation of the facts surrounding the murder and Van Hook's apprehension, *see State v. Van Hook*, 1987 WL 11202 (Ohio Ct. App. May 13, 1987), and *Van Hook v. Anderson*, 444 F.3d 830 (6th Cir. 2006), *vacated en banc*, 488 F.3d 411 (2007).

issues. *Van Hook v. Anderson*, 444 F.3d 830 (6th Cir. 2006), *vacated en banc*, 488 F.3d 411 (6th Cir. 2007) (by a vote of 8-7), *cert. denied*, 128 S. Ct. 614 (2007). After the Sixth Circuit, *en banc*, vacated our judgment and affirmed the district court's denial of the petition on the confession issue, the majority returned this case to our panel to analyze Van Hook's remaining grounds for habeas relief.

After a careful review of the record, we conclude that Van Hook's trial counsel was ineffective during the mitigation phase of the trial, thereby violating his rights under the Sixth Amendment, as interpreted by the Supreme Court in three cases, *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003) (incorporating the American Bar Association Guidelines For the Appointment and Performance of Counsel in Death Penalty Cases as the professional standard of performance), and *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (same). His counsel was deficient by failing to fully investigate and present as evidence all available mitigating factors. We reverse the decision of the district court with respect to ineffective assistance of counsel at the mitigation phase of the trial. We remand the case to the district court with instruction to issue a writ of habeas corpus vacating Van Hook's death sentence unless the State conducts a new penalty phase proceeding within 180 days of remand.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244, *et seq.*, was signed into law and became effective on April 24, 1996. Because Van Hook filed his habeas

corpus petition on October 10, 1995, the Act does not apply as a constraint on our interpretation and application of constitutional standards in this death penalty case. *See Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999). We review *de novo* the conclusions of the district court. *See Powell v. Collins*, 332 F.3d 376, 388 (6th Cir. 2003).

Since 1984, the standard for whether counsel's ineffectiveness fell below the minimum requirements of the Sixth Amendment contains two components: (1) the deficient performance of counsel and (2) the resulting prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on an ineffective assistance of counsel claim, Van Hook must satisfy both the deficient performance and prejudice prongs of *Strickland*. *See Harries v. Bell*, 417 F.3d 631, 636 (6th Cir. 2005). For Van Hook to prove that his counsel's performance was constitutionally deficient, the performance must have fallen "below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. at 688, "under prevailing professional norms." While the Court in *Strickland* did not lay out a detailed, bright-line set of rules for determining whether counsel's performance is adequate, as it did later in *Wiggins* and *Rompilla*, the Court did require that in normal cases such as this one counsel must investigate fully all aspects of a case, *id.* at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). It explained that this duty is of utmost importance in capital murder cases, especially at the mitigation phase where the lawyer's work may be the difference

between life and death. *See id.* at 706 (Brennan, J., concurring in part and dissenting in part); *Harries v. Bell*, 417 F.3d at 637 ("The prospect of being put to death unless counsel obtains and presents something in mitigation magnifies counsel's responsibility to investigate") (emphasis and internal quotations omitted). Thus, the typical focus of analysis in an ineffective assistance of counsel during mitigation case is "whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (emphasis in original).

After *Strickland*, this Court and the Supreme Court made clear in a number of cases that counsel in death cases should follow closely the ABA standards referred to above. *See Wiggins v. Smith*, 539 U.S. at 524, *Rompilla v. Beard*, 545 U.S. at 387 (2005) ("[W]e long have referred [to ABA standards] as guides to determine what is reasonable") (internal quotations omitted); *Haliym v. Mitchell*, 492 F.3d 680, 717-18 (6th Cir. 2007) (explaining that "the fact that counsel's performance fell short of several of the American Bar Association's guidelines" further reinforced the conclusion that counsel's performance was deficient). We have explained clearly that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases [hereinafter ABA Guidelines] provide the "guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003); *see also Dickerson v. Bagley*, 453 F.3d 690, 693 (6th Cir. 2006) ("Our Court has

made clear that . . . counsel for defendants in capital cases must fully comply with [the ABA Guidelines].").

Van Hook is correct that the performance of his trial counsel was deficient during the mitigation phase because his attorneys failed to fully investigate and present evidence of all the potential mitigating factors that could have reduced his sentence from death to life imprisonment. Counsel has a duty to investigate fully, unless counsel makes a reasonable strategic choice to limit the investigation. *See Strickland*, 466 U.S. at 690-91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable judgments support the limitations on investigation.").

Our Court's precedents make clear that a partial but ultimately incomplete mitigation investigation is inadequate. *See Dickerson v. Bagley*, 453 F.3d 690, 695-97 (6th Cir. 2006) (holding that trial counsel was ineffective, despite having presented eight witnesses at mitigation, for failing to discover and introduce evidence that the defendant had a low I.Q., had a borderline personality disorder, was taunted at school, and was referred to as "the moron" by his mother); *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (holding trial counsel deficient at mitigation for failing to fully investigate the defendant's family history and mental health, despite having conducted at least six interviews). This is particularly true when counsel's investigation failed to reveal any of the significant, potentially mitigating details of the defendant's personal and

family history. *See Haliym v. Mitchell*, 492 F.3d 680, 713 (6th Cir. 2007) (explaining that "the Sixth Circuit has frequently considered [the defendant's family history of abuse] an important mitigation factor"). Because the "history, character, and background of the offender" is expressly listed as a statutory mitigating factor, Ohio Rev. Code Ann. § 2929.04(B), it is of utmost importance for counsel to investigate fully and present any aspects of the defendant's upbringing that might bear on his culpability. The ABA Guidelines explain that this investigation ought to include interviews with family members and all other people who knew the client: "It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others." ABA Guidelines ¶ 10.7, at 83. Such thorough interviews are necessary to reveal all potential arguments to support a case for mitigation.

Both this Court and the Supreme Court have also held counsel's performance deficient when counsel's last-minute investigation resulted in overlooking potentially powerful mitigating evidence. *See Williams v. Taylor*, 529 U.S. 362, 396-99 (2000) (explaining that counsel only began preparing for the mitigation proceeding "a week before the trial," thus not having enough time to uncover records of the defendant's "nightmarish childhood"); *Powell v. Collins*, 332 F.3d 376, 398 (6th Cir. 2003) (stating that the trial counsel spent only "two full business days" preparing for mitigation); *Glenn v. Tate*, 71

F.3d 1204, 1207 (holding that counsel's failure to make any significant preparations for the mitigation phase until after the conclusion of the guilt phase was itself "objectively unreasonable"). The requirement for counsel to perform thorough, not last-minute, investigations before a mitigation hearing is further reinforced by the ABA Guidelines: "The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase offenses, decisions about the need for expert evaluations, motions practice, and plea negotiations." ABA Guidelines ¶ 10.7 at 82 (internal parentheticals omitted). The ABA Guidelines also explain that preparing for the mitigation phase of trial "requires extensive and generally unparalleled investigation into personal and family history," *Id.* ¶ 10.7, at 81, as well as school, medical and psychological records.

Applying these clear rules to the performance of Van Hook's trial counsel, it is clear that counsel's investigation into and presentation of mitigating evidence was deficient. While Van Hook's trial attorneys uncovered a little information about his traumatic childhood experience in their last-minute investigation, many of the most important details were not discovered and therefore were never presented to the sentencer. Significantly, trial counsel's investigation failed to reveal that Van Hook's parents repeatedly beat him (J.A. at 1619), that he had witnessed his father attempt to kill his mother several times (J.A. at 1619), and that his mother was committed to a psychiatric hospital when he was between four and five years old (J.A. at 1570). These details of his childhood are even more

unsettling and potentially mitigating than the omitted family background evidence in *Dickerson*, where the omitted evidence simply included the fact that the defendant had been taunted at school and referred to as the "moron." The details about Van Hook's childhood, which were uncovered later by the more thorough investigation of Van Hook's habeas counsel, demonstrate that trial counsel's investigation into Van Hook's background was never finished because the investigation was conducted at the last minute.

Van Hook's counsel's mitigation investigation did not "begin quickly" before trial. Rather, after the guilt phase, counsel started a last minute investigation for the mitigation hearing. (J.A. at 4400-04.) His attorneys thus spent far less time preparing than the counsel in Williams, where counsel was deemed ineffective for not having begun preparing for mitigation until a week before the guilt phase of trial. This cursory preparation for mitigation also parallels the preparations by counsel in Glenn, which this Court held to be objectively unreasonable.

By not performing the sort of extensive, thorough investigation that is a minimum requirement of trial counsel in these cases, the performance of Van Hook's counsel turned up very little of the available mitigation evidence. Contrary to the perception of the state appellate court, this omitted evidence was much more than "merely cumulative." *State v. Van Hook*, 1992 WL 308350, at *2 (Ohio Ct. App. Oct. 21, 1992). This omitted evidence goes far beyond the brief details of his

parents' alcohol abuse and dysfunctional relationship that were presented at mitigation.

Nor can counsel's decision to terminate the mitigation investigation before uncovering this information be considered a reasonable, strategic decision. Considering the information that they had already learned about Van Hook's abusive family background, counsel certainly had reason to suspect that much worse details existed. But his attorneys decided not to interview or even contact Van Hook's step-sister, his paternal uncle, two of his paternal aunts, his maternal uncle, and the psychiatrist who treated his mother when she was committed. All of these individuals could have helped his counsel narrate the true story of Van Hook's childhood experiences in mitigation. All of them would have been willing to testify on his behalf. (J.A. 1569-73, 1619-26.)[2]

---

[2] Counsel's decision not to introduce additional family background witnesses also cannot be justified under the strategy of attempting to prevent the sentencer from learning about prior criminal convictions. In several of our recent cases where few mitigation witnesses were introduced, we refused to find counsel's performance deficient in large part because these witnesses likely would have had to reveal the defendant's history of violence. *See Durr v. Mitchell*, 487 F.3d 423, 436 (6th Cir. 2007) (finding counsel not to be deficient when introducing family and friend witnesses might have caused prior rape convictions to come up in cross-examination); *Tinsley v. Million*, 399 F.3d 796, 809 (6th Cir. 2005) (finding counsel's decision not to introduce any mitigating character evidence reasonable because it might have revealed his prior manslaughter conviction); *cf. Hartman v. Bagley*, 492 F.3d 347, 360 (6th Cir. 2007) (finding counsel's decision not to introduce expert's report

Failing to complete a mitigation investigation when additional family witnesses are available is not sound trial strategy; neither is waiting until four days before the mitigation hearing to begin the investigation. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Haliym v. Mitchell*, 492 F.3d 680, 712 (6th Cir. 2007); *Dickerson v. Bagley*, 453 F.3d 690, 695 (6th Cir. 2006); *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005). Because his trial lawyers failed to conduct a full mitigation investigation and present available mitigating evidence to the sentencer, their performance fell short of "prevailing professional norms,'" *Strickland*, 466 U.S. at 688.

For an ineffective assistance of counsel claim to succeed, counsel must not only have performed deficiently, but that performance must have prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). To prevail on the prejudice prong of a *Strickland* claim, Van Hook must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* Accordingly, because Van Hook challenges his death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance

---

"strategic" because "it paint[ed] a decidedly unsympathetic portrait" of the defendant). To the contrary, the sentencer in Van Hook's case already knew of his prior convictions, and any additional witnesses that might have been called would have only further developed his case for mitigation.

of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. Van Hook must therefore show that his counsel's errors "were serious enough to deprive [him] of a proceeding the result of which was reliable." *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1995).

Counsel's deficient performance prevented the three-judge panel from learning fully about the two statutory mitigating factors that were the strongest in his case — his traumatic family background and his mental illness.

Had his attorneys performed a complete mitigation investigation, that panel would have learned how Van Hook was often beaten by his parents, how he saw his father try to kill his mother, and how his mother was committed to a psychiatric hospital when he was a young child. (J.A. at 1570, 1619.) Further, had his attorneys sought out the available family members willing to help tell his story, that panel would have heard additional "first-hand accounts from those who knew [Van Hook] best." *Powell v. Collins*, 332 F.3d 376, 400 (6th Cir. 2003).

Our conclusion is bolstered by the fact that Ohio is a so-called "weighing" state, which means that the aggravating circumstances must outweigh the mitigating factors in order to impose the death penalty. Ohio Rev. Code Ann. § 2929.04(B). Van Hook's conviction only qualified for one of Ohio's statutory aggravating circumstances: his offense "was committed while [he] was committing . . . aggravated robbery." *Id.* § 2929.04(A)(7). Thus, the introduction of more available mitigating evidence

could certainly have tipped the scales in favor of his life. The threshold for finding prejudice in this case is thus lower than in previous cases, where we found prejudice despite the trial courts' having found multiple aggravating circumstances. *Cf. Dickerson v. Bagley*, 453 F.3d 690, 691 (6th Cir. 2006) (finding prejudice on reweighing despite two aggravating factors); *Harries v. Bell*, 417 F.3d 631, 634 (6th Cir. 2005) (same); *Skaggs v. Parker*, 235 F.3d 261, 264 (6th Cir. 2000) (same).

We believe that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. This is especially true because, as in *Dickerson*, "any one of the three judges alone could have prevented imposition of the death penalty." 453 F.3d at 699 (citing Ohio Rev. Code Ann. § 2929.03(D)(3), which requires unanimity for a death sentence). While it is possible that the panel "could have heard the evidence described above, and still have decided on the death penalty . . . that is not the appropriate test. Instead, we must ask whether 'the available mitigating evidence, taken as a whole, might well have influenced the [panel's] appraisal of [Van Hook's] culpability.'" *Harries v. Bell*, 417 F.3d 631, 640 (6th Cir. 2005) (citations omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003)). Considering the evidence that was available and yet omitted, we conclude that, absent Van Hook's counsel's deficiency, there is a reasonable probability that the result of his sentencing proceeding would have been different. The errors were "serious

enough to deprive [him] of a proceeding the result of which was reliable." *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1995).

Because we have decided that counsel failed to conduct a full mitigation investigation and present available mitigating evidence to the sentencer and thereby offered constitutionally ineffective assistance to Van Hook at the sentencing phase of the trial, we will not decide, and we therefore pretermit, the remaining issues. For the foregoing reasons, we reverse the decision of the district court and remand the case to the district court with instructions to issue a writ of habeas corpus vacating Van Hook's death sentence unless the State conducts a new penalty phase proceeding within 180 days of remand.

APPENDIX B

No. 03-4207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. VAN HOOK,

Petitioner-Appellant,

v.

CARL S. ANDERSON, Warden,

Respondent-Appellee.

ORDER

Filed: Feb. 12, 2009

BEFORE: BOGGS, Chief Judge; MERRITT, MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE and WHITE, Circuit Judges.

On December 18, 2008, a majority of the Judges of this Court in regular active service voted for rehearing of this case en banc. That order had the effect of vacating the panel's opinion, staying the mandate and restoring the case to the appellate docket. See Sixth Cir. R. 35(a). Since then, the members of the panel have expressed an interest in issuing an amended opinion that may make consideration of this case by the full Court unnecessary, and a majority of the Judges of the en banc Court have voted to return this case to the

panel. Accordingly, it is **ORDERED** that this case be referred back to the original panel for further consideration and disposition.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Clerk

APPENDIX C

No. 03-4207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. VAN HOOK,

Petitioner-Appellant,

v.

CARL S. ANDERSON, WARDEN,

Respondent-Appellee.

ORDER
Filed: December 18, 2008

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

"The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is

vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Clerk

APPENDIX D

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0275p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-4207

ROBERT J. VAN HOOK,

Petitioner-Appellant,

v.

CARL S. ANDERSON, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 94-00269—George C. Smith, District Judge.

Argued: December 6, 2005

Decided and Filed: August 4, 2008

Before: MERRITT, MARTIN, and MOORE, Circuit Judges.

COUNSEL

ARGUED: James D. Owen, Keith A. Yeazel, Columbus, Ohio, for Appellant. Stephen E. Maher, OFFICE OF THE ATTORNEY GENERAL OF

OHIO, Columbus, Ohio, for Appellee. **ON BRIEF:** Keith A. Yeazel, James D. Owen, Columbus, Ohio, for Appellant. Stephen E. Maher, Charles L. Wille, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee.

OPINION

MERRITT, Circuit Judge. This is an appeal in an Ohio death penalty case by the prisoner, Van Hook, seeking habeas corpus relief under 28 U.S.C. § 2254. On the evening of February 18, 1985, petitioner Robert Van Hook arrived at a bar frequented by male homosexuals in Cincinnati, Ohio. He left the bar with David Self, and the two proceeded to Self's apartment. Once there, Van Hook strangled Self to the point of unconsciousness. He then brutally killed Self, stabbing him several times in the head and abdomen. After stealing a few items from Self's apartment, Van Hook fled to Florida, where he was apprehended over a month later and subsequently confessed to the murder.[1]

Back in Ohio, Van Hook waived his rights to a trial by jury, and he pleaded not guilty and not guilty by reason of insanity. The three-judge panel, elected under Ohio law, rejected this defense and found him

---

[1] For a more detailed recitation of the facts surrounding the murder and Van Hook's apprehension, *see State v. Van Hook*, 1987 WL 11202 (Ohio Ct. App. May 13, 1987), and *Van Hook v. Anderson*, 444 F.3d 830 (6th Cir. 2006), *vacated en banc*, 488 F.3d 411 (2007).

guilty of aggravated murder and aggravated robbery, which made him eligible for the death penalty under Ohio Rev. Code Ann. § 2929.04(A) (West 2008). Finding that the mitigating evidence did not outweigh the aggravators, the three-judge panel imposed the death penalty instead of life imprisonment.

Though he did not deny killing Self, Van Hook asserted unsuccessfully a variety of errors both on direct appeal and in state post-conviction proceedings. *See State v. Van Hook*, 530 N.E.2d 883 (Ohio 1988), *cert. denied*, 489 U.S. 1100 (1989). After exhausting all of his state court remedies, Van Hook sought a writ of habeas corpus in federal district court.

The district court denied the petition on all asserted claims of error. Our panel then reversed the judgment of the district court because under *Edwards v. Arizona*, 451 U.S. 477 (1981), Van Hook's confession to the Cincinnati Police should have been suppressed. We pretermitted all other remaining issues. *Van Hook v. Anderson*, 444 F.3d 830 (6th Cir. 2006), *vacated en banc*, 488 F.3d 411 (6th Cir. 2007) (by a vote of 8-7), *cert. denied*, 128 S. Ct. 614 (2007). After the Sixth Circuit, *en banc*, vacated our judgment and affirmed the district court's denial of the petition on the confession issue, the majority returned this case to our panel to analyze Van Hook's remaining grounds for habeas relief.

After a careful review of the record, we conclude that Van Hook's trial counsel was ineffective during the mitigation phase of the trial for three basic reasons, thereby violating his rights

under the Sixth Amendment, as interpreted by the Supreme Court in three cases, *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003) (incorporating the American Bar Association Guidelines For the Appointment and Performance of Counsel in Death Penalty Cases as the professional standard of performance), and *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (same). First, his counsel was deficient by failing to fully investigate and present as evidence all available mitigating factors; second, by failing to secure or attempt to secure an independent mental health expert to testify that the crime was the product of a mental disease; and third, by mistakenly introducing and also failing to object to proscribed evidence that was clearly damaging to Van Hook's case. The combined effect of these three errors prejudiced Van Hook, rendered the mitigating hearing unreliable, and led to the imposition of the death penalty. For these reasons, we reverse the decision of the district court with respect to ineffective assistance of counsel at the mitigation phase of the trial. We remand the case to the district court with instruction to issue a writ of habeas corpus vacating Van Hook's death sentence unless the State conducts a new penalty phase proceeding within 180 days of remand.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244, et seq., was signed into law and became effective on April 24, 1996. Because Van Hook filed his habeas corpus petition on October 10, 1995, the Act does not apply as a constraint on our interpretation and application of constitutional standards in this death penalty case. *See Mapes v. Coyle*, 171 F.3d 408, 413

(6th Cir. 1999). We review *de novo* the conclusions of the district court. *See Powell v. Collins*, 332 F.3d 376, 388 (6th Cir. 2003).

Since 1984, the standard for whether counsel's ineffectiveness fell below the minimum requirements of the Sixth Amendment contains two components: (1) the deficient performance of counsel and (2) the resulting prejudice of the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on an ineffective assistance of counsel claim, Van Hook must satisfy both the deficient performance and prejudice prongs of *Strickland*. *See Harris v. Bell*, 417 F.3d 631, 636 (6th Cir. 2005). For Van Hook to prove that his counsel's performance was constitutionally deficient, the performance must have fallen "below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. at 688, "under prevailing professional norms." While the Court in *Strickland* did not lay out a detailed, bright-line set of rules for determining whether counsel's performance is adequate, as it did later in *Wiggins* and *Rompilla*, the Court did require that in normal cases such as this one counsel must investigate fully all aspects of a case, *id.* at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). It explained that this duty is of utmost importance in capital murder cases, especially at the mitigation phase where the lawyer's work may be the difference between life and death. *See id.* at 706 (Brennan, J., concurring in part and dissenting in part); *Harries v. Bell*, 417 F.3d 631, 637 (6th Cir. 2005) ("The prospect of being put to death unless counsel obtains and

presents something in mitigation magnifies counsel's responsibility to investigate") (emphasis and internal quotations omitted). Thus, the typical focus of analysis in an ineffective assistance of counsel during mitigation case is "whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable.*" *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (emphasis in original).

After Strickland, this Court and the Supreme Court made clear in a number of cases that counsel in death cases should follow closely the ABA standards referred to above. *See Wiggins v. Smith*, 539 U.S. at 524, *Rompilla v. Beard*, 545 U.S. at 387 (2005) ("[W]e long have referred [to ABA standards] as guides to determine what is reasonable") (internal quotations omitted); *Haliym v. Mitchell*, 492 F.3d 680, 717-18 (6th Cir. 2007) (explaining that "the fact that counsel's performance fell short of several of the American Bar Association's guidelines" further reinforced the conclusion that counsel's performance was deficient). We have explained clearly that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases [hereinafter ABA Guidelines] provide the "guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003), *see also Dickerson v. Bagley*, 453 F.3d 690, 693 (6th Cir. 2006) ("Our Court has made clear that . . . counsel for defendants in capital cases must fully comply with [the ABA Guidelines]."). All three of the deficiencies listed above, and explained more fully below, fall well

below objective standards of reasonableness outlined in the ABA standards as applied in the case law developed in capital cases interpreting the Sixth Amendment requirement of the effective "assistance of counsel for his defense." U.S. Const. amend. VI.

I. Failure to Investigate Mitigating Factors

Van Hook is correct that the performance of his trial counsel was deficient during the mitigation phase because his attorneys failed to fully investigate and present evidence of all the potential mitigating factors that could have reduced his sentence from death to life imprisonment. Counsel has a duty to investigate fully, unless counsel makes a reasonable strategic choice to limit the investigation. *See Strickland*, 466 U.S. at 690-91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable judgments support the limitations on investigation.").

Our Court's precedents make clear that a partial but ultimately incomplete mitigation investigation is inadequate. *See Dickerson v. Bagley*, 453 F.3d 690, 695-97 (6th Cir. 2006) (holding that trial counsel was ineffective, despite having presented eight witnesses at mitigation, for failing to discover and introduce evidence that the defendant had a low I.Q., had a borderline personality disorder, was taunted at school, and was referred to as "the moron" by his mother); *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (holding trial counsel deficient at mitigation for failing to fully investigate the defendant's family history and mental health, despite having conducted at least six interviews).

This is particularly true when counsel's investigation failed to reveal any of the significant, potentially mitigating details of the defendant's personal and family history. *See Haliym v. Mitchell*, 492 F.3d 680, 713 (6th Cir. 2007) (explaining that "the Sixth Circuit has frequently considered [the defendant's family history of abuse] an important mitigation factor"). Because the "history, character, and background of the offender" is expressly listed as a statutory mitigating factor, Ohio Rev. Code Ann. § 2929.04(B), it is of utmost importance for counsel to investigate fully and present any of the aspects of the defendant's upbringing that might bear on his culpability. The ABA Guidelines explain that this investigation ought to include interviews with family members and all other people who knew the client: "It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others." ABA Guidelines ¶ 10.7, at 83. Such thorough interviews are necessary to reveal all potential arguments to support a case for mitigation.

Both this Court and the Supreme Court have also held counsel's performance deficient when counsel's last-minute investigation resulted in overlooking potentially powerful mitigating evidence. *See Williams v. Taylor*, 529 U.S. 362, 396-99 (2000) (explaining that counsel only began preparing for the mitigation proceeding "a week before the trial," thus not having enough time to uncover records of the defendant's "nightmarish childhood"); *Powell v.*

Collins, 332 F.3d 376, 398 (6th Cir. 2003) (stating that the trial counsel spent only "two full business days" preparing for mitigation); *Glenn v. Tate*, 71 F.3d 1204, 1207 (holding that counsel's failure to make any significant preparations for the mitigation phase until after the conclusion of the guilt phas was itself "objectively unreasonable"). The requirement for counsel to perform thorough, not last-minute, investigations before a mitigation hearing is further reinforced by the ABA Guidelines: "The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase offenses, decisions about the need for expert evaluations, motions practice, and plea negotiations." ABA Guidelines ¶ 10.7 at 82 (internal parentheticals omitted). The ABA Guidelines also explain that preparing for the mitigation phase of trial "requires extensive and generally unparalleled investigation into personal and family history." *Id.* ¶ 10.7, at 81.

Applying these clear rules to the performance of Van Hook's trial counsel, it is clear that counsel's investigation into and presentation of mitigating evidence was deficient. While Van Hook's trial attorneys uncovered a little information about his traumatic childhood experience in their last-minute investigation, many of the most important details were not discovered and therefore were never presented to the sentencer. Significantly, trial counsel's investigation failed to reveal that Van Hook's parents repeatedly beat him (J.A. at 1619), that he had witnessed his father attempt to kill his mother several times (J.A. at 1619), and that his mother was committed to a psychiatric hospital

when he was between four and five years old (J.A. at 1570). These details of his childhood are even more unsettling and potentially mitigating than the omitted family background evidence in *Dickerson*, where the omitted evidence simply included the fact that the defendant had been taunted at school and referred to as the "moron." The details about Van Hook's childhood, which were uncovered later by the more thorough investigation of Van Hook's habeas counsel, demonstrate that trial counsel's investigation into Van Hook's background was never finished because the investigation was conducted at the last minute.

Van Hook's counsel did not "begin quickly" before trial. Rather after the guilt phase, counsel started a last minute investigation for the mitigation hearing. (J.A. at 4400-04.) His attorneys thus spent far less time preparing than the counsel in *Williams*, where counsel was deemed ineffective for not having begun preparing for mitigation until a week before the guilt phase of trial. This cursory preparation for mitigation also parallels the preparations by counsel in *Glenn*, which this Court held to be objectively unreasonable.

By not performing the sort of extensive, thorough investigation that is a minimum requirement of trial counsel in these cases, the performance of Van Hook's counsel turned up very little of the available mitigation evidence. Contrary to the perception of the state appellate court, this omitted evidence was much more than "merely cumulative." *State v. Van Hook*, 1992 WL 308350, at *2 (Ohio Ct. App. Oct. 21, 1992). This omitted

evidence goes far beyond the brief details of his parents' alcohol abuse and dysfunctional relationship that were presented at mitigation.

Nor can counsel's decision to terminate the mitigation investigation before uncovering this information be considered a reasonable, strategic decision. Considering the information that they had already learned about Van Hook's abusive family background, counsel certainly had reason to suspect that much worse details existed. But his attorneys decided not to interview or even contact Van Hook's step-sister, his paternal uncle, two of his paternal aunts, his maternal uncle, and the psychiatrist who treated his mother when she was committed. All of these individuals could have helped his counsel narrate the true story of Van Hook's childhood experiences in mitigation. All of them would have been willing to testify on his behalf. (J.A. 1569-73, 1619-26.)[2]

---

[2] Counsel's decision not to introduce additional family background witnesses also cannot be justified under the strategy of attempting to prevent the sentencer from learning about prior criminal convictions. In several of our recent cases where few mitigation witnesses were introduced, we refused to find counsel's performance deficient in large part because these witnesses likely would have had to reveal the defendant's history of violence. *See Durr v. Mitchell*, 487 F.3d 423, 436 (6th Cir. 2007) (finding counsel not to be deficient when introducing family and friend witnesses might have caused prior rape convictions to come up in cross-examination); *Tinsley v. Million*, 399 F.3d 796, 809 (6th Cir. 2005) (finding counsel's decision not to introduce any mitigating character evidence reasonable because it might have revealed his prior manslaughter conviction); *cf. Hartman v. Bagley*, 492 F.3d 347, 360 (6th Cir.

Failing to complete a mitigation investigation when additional family witnesses are available is not sound trial strategy; neither is waiting until four days before the mitigation hearing to begin the investigation. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Haliym v. Mitchell*, 492 F.3d 680, 712 (6th Cir. 2007); *Dickerson v. Bagley*, 453 F.3d 690, 695 (6th Cir. 2006); *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005). Because his trial lawyers failed to conduct a full mitigation investigation and present available mitigating evidence to the sentencer, their performance fell short of "prevailing professional norms," *Strickland*, 466 U.S. at 688.

II. The Failure to Seek an Independent Mental Health Expert to Testify for the Defendant

Trial counsel's last minute mitigation investigation led to another violation of ABA Guidelines respecting the effective assistance of counsel: the failure to put on evidence that Van Hook's criminal behavior was the result of severe mental illness. Only in the post-conviction phase of the case did Van Hook's counsel seek or find an expert witness to testify that Van Hook's crime was the result of a mental disease. All three of the experts who testified at trial were appointed by the court, not selected by the defense, and testified in

---

2007) (finding counsel's decision not to introduce expert's report "strategic" because "it paint[ed] a decidedly unsympathetic portrait" of the defendant). To the contrary, the sentencer in Van Hook's case already knew of his prior convictions, and any additional witnesses that might have been called would have only further developed his case for mitigation.

favor of the prosecution's argument that Van Hook did not suffer from a mental illness. The failure to seek or put on a mental health expert who would give evidence favorable to Van Hook was a serious error.

The ABA Guidelines state what effective death penalty counsel have known and practiced for years:

> In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider are the following: Expert . . . witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability . . . [to] otherwise support a sentence less than death . . . and/or to rebut or explain evidence presented by the prosecutor.

ABA Guidelines ¶ 10.11, at 104. These standards for determining prevailing professional norms in death penalty cases highlight the way that an expert witness working closely with counsel can strengthen the defense's case for mitigation. This court has long held that these standards "represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases." *Hamblin*, 354 F.3d 482, 487. They are "the clearest exposition of counsel's duties at the penalty phase of a capital case." *Id.* at 488.

The complexities of Van Hook's case demonstrate his particular need for an independent mental health expert to assist in the defense. He pleaded not guilty by reason of insanity (J.A. at 362), and his justification for this was that he had been diagnosed with a mental illness, *i.e.*, "borderline personality disorder." Furthermore, after Van Hook was found guilty, one of the few statutory mitigating factors relevant to his case was whether he "lacked substantial capacity to appreciate the criminality of [his] conduct or to conform [his] conduct to the requirements of the law" as a result of a "*mental disease or defect.*" Ohio Rev. Code Ann. § 2929.04(B)(3) (emphasis added). Presenting a strong case that his psychiatric disorder constituted such a "mental disease or defect" required the aid of an independent psychiatric expert. Moreover, the other potentially mitigating factors to be weighed for his benefit were his "history, character, and background," as well as any other mitigating factors "relevant to the issue of whether [he] should be sentenced to death." *Id.* § 2929.04(B)(7). Van Hook had experienced a violent, traumatic childhood. Testimony by his father and mother during the mitigating hearing revealed that his father was abusive to his mother (J.A. at 4497), his parents had divorced when he was young (J.A. at 4500), and his father began taking him to bars at age eleven, where he was encouraged to consume alcohol and participate in fights (J.A. at 4467-69). An independent defense expert was therefore also crucial to explain to the sentencer how the details of his upbringing affected him psychologically, thereby reducing his overall culpability for the murder. An

independent mental health expert was necessary to establish the strongest case of mental illness for the sentencer.

Despite the fact that Van Hook was entitled to an independent mental health expert and that such an expert would have bolstered his case, his trial counsel failed to exercise this right. Because the court had found Van Hook to be indigent (J.A. at 363), and because he pleaded not guilty by reason of insanity (J.A. at 362), Van Hook had triggered his right to an expert. *See Ake v. Oklahoma*, 470 U.S. 68, 85 (1985); *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003). While the court did appoint three mental health experts to evaluate Van Hook, it is clear that none of these experts was the sort of independent expert needed by the defense. The circumstances surrounding the appointment of experts, as well as their evaluations as reported to the trial court, are summarized by the district court:

> Petitioner was indicted on April 18, 1985. Less than a week later, on April 23, 1985, petitioner's defense attorneys filed a plea of Not Guilty by Reason of Insanity ("NGRI"), which triggered three court-ordered psychiatric evaluations. The trial court appointed Dr. Emmet Cooper, Dr. Nancy Schmidtgoessling, and the Court Psychiatric Center to conduct evaluations of petitioner pursuant to the NGRI plea.
>
> Dr. Emmet Cooper, a psychiatrist, was called by defense counsel during petitioner's case in chief [and during the penalty phase of the trial]. He testified that petitioner suffered

from a borderline personality disorder . . . . *But Dr. Cooper could not say that petitioner suffered from a mental disease or defect.*

Dr. Nancy Schmidtgoessling, a clinical psychologist, testified for the prosecution during its rebuttal case and was also called by the defense during the penalty phase of the trial . . . . *She also testified, however, that petitioner never suffered from a mental disease or defect,* that he was aware of the quality and wrongfulness of his action, and that he was able to conform his conduct.

Dr. Teresito Alquizola, a physician and psychiatrist, testified for the prosecution during its rebuttal case. . . . *Dr. Alquizola testified that petitioner did not suffer from a mental disease or defect,* and that at the time of the offense, he possessed the capacity to know the wrongfulness of his actions and, to a large extent, was able to conform his conduct. . . .

In addition to the testimony given by Drs. Cooper, Schmidtgoessling, and Alquizola, a fourth report was prepared by Dr. Donna E. Winter of the Court Psychiatric Center in connection with the mitigation phase of petitioner's trial, pursuant to [Ohio Rev. Code Ann. § 2947.06]. Dr. Winter found that petitioner suffered form a borderline personality disorder. Dr. Winter went on to conclude that . . . . *petitioner was not suffering from a mental disease or defect,* that he was able to appreciate the criminality of his

> actions, and that he was capable of conforming his conduct.

(Emphasis added, J.A. at 5934-36.) It is evident from a review of the district court's summary that, of the four experts whose evaluations were considered as evidence, three were appointed by the trial court as an automatic response to Van Hook's insanity plea, and the fourth was retained by the prosecution. Van Hook's counsel did not seek an independent expert, as did the prosecution, but instead relied on the experts that had been triggered for Van Hook by his plea. This deficiency parallels the performance of counsel in *Haliym v. Mitchell*, 492 F.3d 680, 717 (6th Cir. 2007), where we recently held counsel's performance to be deficient for choosing to rely on the report of a court-appointed expert instead of utilizing available funds for an independent expert. It is also analogous to the performance of counsel in *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1995), where we faulted counsel for "settl[ing] for court-appointed experts whose reports were to be given to the jury . . . rather than exercising the [defendant's] right to obtain defense experts."

The record undermines the State's argument that Dr. Cooper (whom Van Hook called in the absence of his own expert during both the guilt and mitigation phases of trial) was a sufficient expert who was independent of the prosecution. Dr. Cooper testified during the mitigation hearing that Van Hook had "no remorse," that he was a "dangerous individual," and that he did not suffer from a "mental illness or defect." (J.A. at 4443.) Dr. Cooper was not

an effective substitute for a real mental health expert selected by the defense.

The expert opinion of Dr. Martin Ryan, a psychiatrist retained by Van Hook's habeas counsel, demonstrates the magnitude of this failure. Dr. Ryan stated that it is more likely than not that a reasonable psychiatrist at the time would have concluded that Van Hook's severe borderline personality disorder was indeed a mental disease and met the test of "mental disease or defect" established by the Ohio statute quoted above. (J.A. at 5879.) His affidavit, which was submitted to the district court, explained that the disorder was considered a mental disease under the generally accepted standards approved by the American Psychiatric Association. (J.A. at 5879.) Respondent did nothing to rebut these statements by Dr. Ryan either in its brief or at oral argument.

III. Trial Counsel's Mistake Regarding the Pre-sentence Investigation Report

Trial counsel requested a Pre-sentence Investigation Report (the "Report") to be prepared, and that Report, including damaging victim-impact statements, was introduced into evidence during mitigation without any objection from counsel. Courts in Ohio give a defendant in a capital murder trial the statutory option of having such a Report made before the mitigation hearing. Ohio Rev. Code Ann. § 2929.03(D)(1). If the defendant requests the Report, copies of the Report will automatically be furnished to the court, the prosecutor, and the defendant. Counsel then loses control of how the Report is used at the mitigation trial. Experienced

capital counsel generally believe that it is a mistake to ask for such a Report.

This Court has explained before that requesting a Report instead of performing a full mitigation investigation is a sign of inadequate preparation. *See Haliym v. Mitchell*, 492 F.3d 680, 717 n.29 (6th Cir. 2007) (stating that counsel's reliance on a PSI was part of the "overarching question of whether counsel's . . . preparation for mitigation was constitutionally deficient"); *Glenn v. Tate*, 71 F.3d 1204, 1209 (faulting counsel for requesting such a Report). The ABA Guidelines similarly advise counsel for capital defendants in Ohio against requesting it. *See Haliym*, 492 F.3d at 717 (citing ABA Guidelines at 1073) ("Because Ohio provides capital defendants the right to reasonably necessary investigation, experts, or other assistance for trial and penalty phases, capital counsel who request a pre-sentence report instead may be ineffective for doing so.").

Trial counsel then failed to object to the introduction of the victim-impact statement that was contained within the Report. In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court held that the introduction of victim-impact evidence at the mitigation phase of a capital murder trial violates the Eighth Amendment. A few years later, though, the Court retreated somewhat by holding that "the Eighth Amendment erects no *per se* bar" on the introduction of all such evidence. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (emphasis in original). But the *Payne* Court said that it only overturned the part of *Booth* disallowing evidence

"relating to . . . .the impact of the victim's death on the victim's family," and that it did not overrule the part of *Booth* that forbids "a victim family members' characterization and opinions about . . . the appropriate sentence." *Id.* at 830 n.2. Our Court recently aligned itself with many of our sister circuits in holding that victim-impact statements recommending an appropriate sentence are barred by the Eighth Amendment. *See Fautenberry v. Mitchell*, 515 F.3d 614, 638 (6th Cir. 2008) (holding that "the trial court erred in admitting this evidence"); *see also Welch v. Sirnans*, 451 F.3d 675, 703 (10th Cir. 2006) (noting that many circuits have found this portion of *Booth*'s holding "survived the holding in *Payne* and remains valid"). Thus, the introduction of any opinions of the victim's family that suggest an appropriate sentence for the defendants is precluded by the Constitution.

Van Hook's attorneys did not object when the Report they requested caused the entry of the victim-impact statements into evidence during the mitigation hearing. (J.A. at 5561, 5567-68.) The statements included a plea to the sentencer from Mrs. Self, the victim's mother, that Van Hook be given the death penalty. Mrs. Self said that she "fe[lt Van Hook] should receive the maximum possible punishment." (J.A. at 5568.) She also stated that if the State did not execute Van Hook, "it just compounds the offense." (J.A. at 5568.) Finally, she said that "the maximum punishment would prevent another family from suffering as a result of [Van Hook's] actions." (J.A. at 5568.) The victim-impact statement included in the Report therefore contained an opinion by family members about what they

thought to be the appropriate sentence. Trial counsel invited a Report that contained a strong plea for the death penalty and did nothing to keep this recommendation out, even though the Eighth Amendment case law holds its admission unconstitutional.

Additionally, the ABA Guidelines emphasize the importance of counsel's objecting to potentially inadmissible evidence in a capital murder case. *See* ABA Guidelines ¶ 10.7 at § 7 ("One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review."). Because Van Hook's counsel failed to object to the victim-impact evidence, and because his counsel in fact caused the victim-impact statement to go into evidence by requesting such a Report, his attorneys' performance fell below an "objective standard of reasonableness," *Strickland*, 466 U.S. at 688.

In sum, because Van Hook's trial attorneys failed to fully investigate and present his family background as mitigating evidence, failed to obtain the sort of independent mental health expert needed to prepare an effective defense, and failed to object to proscribed, damaging evidence, their performance was constitutionally deficient under the first prong of *Strickland*.

IV. Prejudice

For an ineffective assistance of counsel claim to succeed, counsel must not only have performed deficiently, but that performance must have

prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). To prevail on the prejudice prong of a *Strickland* claim, Van Hook must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* Accordingly, because Van Hook challenges his death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. Van Hook must therefore show that his counsel's errors "were serious enough to deprive [him] of a proceeding the result of which was reliable." *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1995).

Counsel's deficient performance prevented the three-judge panel from learning fully about the two statutory mitigating factors that were the strongest in his case — his traumatic family background and his mental illness. The trial court concluded that there was "absolutely no evidence that would suggest that [he] suffered from a mental disease or defect." (J.A. at 629.) Had counsel sought out an independent mental health expert instead of using the experts automatically appointed by the court, that panel would have heard strong evidence that Van Hook's severe borderline personality disorder should indeed be considered a mental disease. While the court-appointed experts testified to the contrary, Van Hook's habeas expert, Dr. Ryan, testified at length that such a disorder was in fact considered a

mental disease at the time of trial under the generally accepted standards approved by the American Psychiatric Association. (J.A. at 5879.)

Additionally, had his attorneys performed a complete mitigation investigation, that panel would have learned how Van Hook was often beaten by his parents, how he saw his father try to kill his mother, and how his mother was committed to a psychiatric hospital when he was a young child. (J.A. at 1570, 1619.) Further, had his attorneys sought out the available family members willing to help tell his story, that panel would have heard additional "first-hand accounts from those who knew [Van Hook] best," *Powell v. Collins*, 332 F.3d 376, 400 (6th Cir. 2003).

The deficient performance by Van Hook's counsel also caused the three-judge panel to consider unconstitutional and damaging information while deliberating on the appropriate sentence. It is generally true that, because judges in bench trials often hear inadmissible evidence, they are "presumed to ignore [it] when making decisions." *Harris v. Riviera*, 454 U.S. 339, 346 (1981); *see also Wickline v. Mitchell*, 319 F.3d 813, 823-24 (6th Cir. 2003) (holding that the three-judge panel would not likely have been misled by improper evidence). But here the panel expressly stated in its sentencing opinion that it had considered "the presentence report and mental examination report requested by the defendant."[3] (J.A. at 623). When a panel of

[3] The district court overlooked this important fact entirely in its determination that Van Hook's counsel's failure to object to the

judges expressly states that it considered such inadmissible evidence, it is no longer proper to make such a presumption. For this reason, the present case is also distinguishable from *Fautenberry v. Mitchell*, 515 F.3d 614, 638-39 (6th Cir. 2008), where we held that the Ohio Supreme Court's refusal to reverse a sentence of death based on a similar victim-impact statement was appropriate. In that case, there was "no indication that the panel was influenced by or considered the victim-impact evidence available to them." *Id.* at 638. That cannot be said here.

The combined prejudice Van Hook suffered as a result of his counsel's failure to secure an independent mental health expert, failure to perform a complete mitigation investigation, and failure to object to inadmissible evidence prevented his mitigation hearing from being reliable. Our conclusion is bolstered by the fact that Ohio is a so-called "weighing" state, which means that the aggravating circumstances must outweigh the mitigating factors in order to impose the death penalty. Ohio Rev. Code Ann. § 2929.04(B). Van Hook's conviction only qualified for one of Ohio's statutory aggravating circumstances: his offense "was committed while [he] was committing . . . aggravated robbery." *Id.* § 2929.04(A)(7). Thus, the

---

victim-impact evidence caused him no prejudice. That court stated in its analysis that "there is no indication whatsoever that the trial court gave weight to the victim impact evidence in determining that the aggravating circumstance outweighed the mitigating factors." (J.A. at 5910.) This statement is belied by the record.

introduction of more available mitigating evidence could certainly have tipped the scales in favor of his life. The threshold for finding prejudice in this case is thus lower than in previous cases, where we found prejudice despite the trial courts' having found multiple aggravating circumstances. *Cf. Dickerson v. Bagley*, 453 F.3d 690, 691 (6th Cir. 2006) (finding prejudice on reweighing despite two aggravating factors); *Harries v. Bell*, 417 F.3d 631, 634 (6th Cir. 2005) (same); *Skaggs v. Parker*, 235 F.3d 261, 264 (6th Cir. 2000) (same).

Because of the combined effect of these errors, we believe that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. This is especially true because, as in *Dickerson*, "any one of the three judges alone could have prevented imposition of the death penalty." 453 F.3d at 699 (citing Ohio Rev. Code Ann. § 2929.03(D)(3), which requires unanimity for a death sentence). While it is possible that the panel "could have heard the evidence described above, and still have decided on the death penalty . . . that is not the appropriate test. Instead, we must ask whether 'the available mitigating evidence, taken as a whole, might well have influenced the [panel's] appraisal of [Van Hook's] culpability." *Harries v. Bell*, 417 F.3d 631, 640 (6th Cir. 2005) (citations omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003)). Considering the evidence that was available and yet omitted, together with the evidence that should not have been presented to the panel but was, we conclude that, absent Van Hook's counsel's

deficiency, there is a reasonable probability that the result of his sentencing proceeding would have been different.

V. Conclusion

Because we have decided that counsel offered constitutionally ineffective assistance to Van Hook at the sentencing phase of the trial, we will not decide, and we therefore pretermit the remaining issues. For the foregoing reasons, we reverse the decision of the district court and remand the case to the district court with instructions to issue a writ of habeas corpus vacating Van Hook's death sentence unless the State conducts a new penalty phase proceeding within 180 days of remand.

APPENDIX E

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0192p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-4207

ROBERT J. VAN HOOK,

Petitioner-Appellant,

v.

CARL S. ANDERSON, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 94-00269—George C. Smith, District Judge.

Argued: December 6, 2006

Decided and Filed: May 24, 2007

Before: BOGGS, Chief Judge; MERRITT, MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Keith A. Yeazel, Columbus, Ohio, for Appellant. Diane R. Brey, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee. **ON BRIEF:** Keith A. Yeazel, James D. Owen, Columbus, Ohio, for Appellant. Diane R. Brey, Stephen P. Carney, Stephen E. Maher, Charles L. Wille, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee.

McKEAGUE, J., delivered the opinion of the court, in which BOGGS, C. J., BATCHELDER, GIBBONS, ROGERS, SUTTON, COOK, and GRIFFIN, JJ., joined. COLE, J. (pp. 15-22), delivered a separate dissenting opinion, in which MERRITT, MARTIN, DAUGHTREY, MOORE, CLAY, and GILMAN, JJ., joined. MERRITT (pp. 23-25) and MARTIN (p. 26), JJ., also delivered separate dissenting opinions, with MARTIN, DAUGHTREY, MOORE, COLE, and CLAY, JJ., joining in Judge Merritt's dissent.

OPINION

McKEAGUE, Circuit Judge. Following the arrest of a suspect, the police advise him of his rights outlined in *Miranda v. Arizona*, 384 U.S. 436 (1966). The suspect asks for a lawyer. Under *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), all questioning must then stop (a) until a lawyer has been provided, or (b) unless the suspect "himself" initiates a discussion. Later, police talk to the suspect's mother

(or a close friend, sibling, etc.), and, based on that conversation, they believe that the suspect now wants to talk with them without a lawyer. Are they permitted to approach the suspect and inquire whether he now wants to talk, based solely on the discussion with the mother? Or, rather, are they precluded from acting on that information because it was not communicated to them directly by the suspect? Today we join several of our sister circuits in holding that the police can make the limited inquiry without running afoul of *Edwards*.

I

Petitioner Robert Van Hook went to a Cincinnati bar patronized by male homosexuals in February 1985. He met the victim, David Self, and the two left together for Self's apartment. Once at the apartment, and after Self approached Van Hook in a sexual manner, Van Hook strangled Self to the point of unconsciousness. Using a paring knife from the kitchen, Van Hook repeatedly stabbed Self in the head and abdomen. He attempted unsuccessfully to sever the head from the body. He stabbed so violently that he created a large cavity in Self's body, exposing several internal organs. At one point, he tried to pierce Self's heart. In a final act against Self, Van Hook stuffed several items, including the paring knife, into the gaping cavity and left them there. He proceeded to take several items from Self's apartment and fled.

Van Hook eventually made his way to Ft. Lauderdale, Florida, where he was arrested two months later by local police. The police read him his *Miranda* rights. Although initially agreeing to talk,

Van Hook told police, "[M]aybe I should have an attorney present." JA 5462. The officers, having understood him to be asking for a lawyer, did not further question him about the murder.[1]

Later that day, Cincinnati Police Detective William Davis came to Ft. Lauderdale to facilitate Van Hook's extradition and transportation back to Ohio. Van Hook had not yet been provided with counsel. After talking with the suspect's mother, Det. Davis believed that Van Hook might want to talk to police about the murder. On first engaging Van Hook, Det. Davis discussed the matter of extradition and confirmed that Van Hook wished to waive any objection to extradition. The detective then told Van Hook that they "had a lot to talk about," but that they "could not talk . . . unless he himself wanted to make a statement." JA 3789. "[A]t that point, [Van Hook] indicated he had talked to his mother, and that she had told him just to tell the truth, and he wanted to make a statement." *Id.* After having his *Miranda* rights read to him again, and waiving them, Van Hook gave a full and graphic confession.

---

[1] In 1985, the officers did not have the benefit of the Supreme Court's decision in *Davis v. United States*, 512 U.S. 452 (1994), when the Court made clear that a suspect in custody must "unambiguously request counsel," *id.* at 458, and that "maybe I should talk to a lawyer" is not an unequivocal request, *id.* at 462. In 2007, Van Hook's statement might well not have sufficed to require that questioning be stopped. The officers did, however, understand Van Hook to have asked for a lawyer, and stopped any further questioning of him based on his statement.

A grand jury returned an indictment charging Van Hook with aggravated murder and aggravated robbery. Prior to trial, defense counsel moved to suppress the confession. Finding that Van Hook had invoked his right to have counsel present but then had reinitiated discussions with police, the Ohio trial court admitted the confession. At trial, Van Hook never denied killing Self, but instead claimed temporary insanity. A three-judge panel rejected his defense, convicted him of aggravated murder with a death specification and aggravated robbery and sentenced him to death.

After being denied any relief in the state courts on direct appeal, *see State v. Van Hook*, 530 N.E.2d 883 (Ohio 1988), *cert. denied*, 489 U.S. 1100 (1989), and on collateral review, Van Hook sought a writ of habeas corpus in federal district court. He raised multiple claims of error. The district court denied the petition on all claims. On appeal, a panel of this court reversed the district court's judgment on Van Hook's Fifth Amendment claim, concluding, as a matter of law, that a suspect could not initiate discussions with police through a third party; rather, the suspect, and only the suspect "himself," could "initiate the conversation." *Van Hook v. Anderson*, 444 F.3d 830, 836 (6th Cir. 2006) (vacated). The panel declined to address the factual question of what Van Hook's mother said to Det. Davis that led him to believe Van Hook might want to talk with him. *Id.* It further declined to reach Van Hook's remaining claims for relief. On the warden's petition, the court decided to vacate the panel's opinion and hear the appeal *en banc*.

II

Van Hook sought habeas relief more than a year before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the "AEDPA"). Thus, we review his petition under pre-AEDPA habeas law. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). A "high measure of deference" is owed to the factual findings of state courts. *Sumner v. Mata*, 455 U.S. 591, 598 (1982) (citing the pre-AEDPA version of 28 U.S.C. § 2254(d)); *see also Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999) (explaining that state court findings of fact are presumed correct unless rebutted by clear and convincing evidence); *Lundy v. Campbell*, 888 F.2d 467, 469 (6th Cir. 1989) (noting that federal courts must give "complete deference to evidence-supported state court findings of fact"). On the other hand, we review questions of law, as well as mixed questions of law and fact, *de novo*. *Mapes*, 171 F.3d at 413. Whether a suspect clearly and unequivocally asked for counsel, and whether the suspect initiated discussions with police after asking for counsel, are ultimately legal questions. *United States v. Whaley*, 13 F.3d 963, 966, 968 (6th Cir. 1994). The underlying questions of "what happened"—*i.e.*, "basic, primary, or historical facts"—are, however, findings of fact that are presumed correct unless rebutted with clear and convincing evidence. *Thompson v. Keohane*, 516 U.S. 99, 110-13 (1995); *cf. Whaley*, 13 F.3d at 968 ("While we accept, unless clearly erroneous, the facts that the district court found, whether those facts together constitute an 'initiation' under *Edwards* is a legal question we review *de novo*.").

III

A

Van Hook contends that his confession to the murder of David Self should have been suppressed under *Edwards*. As guaranteed by the Fifth Amendment to the federal Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Of course, "[f]reedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding." *Faretta v. California*, 422 U.S. 806, 834 n.45 (1975). A criminal suspect is free to offer a confession to authorities, subject to special procedural protections.

"[T]he Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment" require "that a confession be voluntary to be admitted into evidence." *Dickerson v. United States*, 530 U.S. 428, 433 (2000) (citations omitted). "[T]he advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion." *Id.* at 434-35 (citation omitted). To address this concern, the Supreme Court "laid down concrete constitutional guidelines for law enforcement agencies and courts to follow," *id.* at 435 (internal quotation marks omitted), including the procedures announced in *Miranda* and extended in *Edwards*.

The rule of *Edwards*—a suspect who is in custody and has asked for a lawyer must not be

subject to further interrogation[2] until a lawyer has been provided or unless the suspect initiates a discussion—is "a corollary to *Miranda*'s admonition that if the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (internal quotation marks and brackets omitted). It "is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Davis*, 512 U.S. at 458 (internal quotation marks omitted). "In the absence of such a bright-line prohibition, the authorities through 'badgering' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself." *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (internal quotation marks and brackets omitted); *see also North Carolina v. Butler*, 441 U.S. 370, 374 (1979) ("Without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."). Moreover, the rule provides "clear and unequivocal guidelines to the law enforcement profession," *Roberson*, 486 U.S. at 682, and "conserves judicial resources which would otherwise be expended in

---

[2] An interrogation is defined as an exchange between police and a suspect in custody "reasonably likely to evoke an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 n.7 (1980).

making difficult determinations of voluntariness," *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990).

B

The rule of *Edwards* embodies two independent inquiries:

> First, courts must determine whether the accused actually invoked his right to counsel. . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

Smith, 469 U.S. at 95 (citations omitted). On the first inquiry, we agree with the district court and find no error in the conclusion of the Ohio courts that Van Hook asked for the presence of a lawyer, especially in light of the police officers' statements that they understood him to have asked for a lawyer, and their cessation of any further questioning. *See Abela v. Martin*, 380 F.3d 915, 926 (6th Cir. 2004) (explaining that courts can consider the "surrounding circumstances" of a request, including the response of the officers, to "confirm that a reasonable officer would understand [the suspect's] statement to be a clear request for counsel"). As to the latter part of the second inquiry, whether Van Hook's waiver of his rights and confession in response to questioning were knowing and intelligent, the district court concluded that they were under the totality of the circumstances. On appeal, Van Hook has not contested the district

court's ruling in this regard.[3] He has, therefore, waived the right to challenge this holding. Fed. R. App. P. 28; *Dixon v. Ashcroft*, 392 F.3d 212, 217 (6th Cir. 2004). It follows that Van Hook's waiver of his rights to silence and to counsel has been finally determined to have been knowing and intelligent. That question is not before us on appeal. Thus, we are left to consider the gravamen of Van Hook's *Edwards* claim: whether he initiated further discussions with the police.

It is undisputed by the parties, and confirmed by the record, that Van Hook did not directly approach the police to discuss the murder. "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484. If a discussion comes at the behest of the police after the right to counsel has been invoked, it is presumed coercive. *Roberson*, 486 U.S. at 685-86. If all the record showed was Det. Davis—unprompted—initiated the discussion, the confession would likely

---

[3] *See, e.g.*, Appellant's Final Brief at 39 ("The discrete issue is whether Van Hook actually initiated contact with CPD Officers through the use of a non-attorney third-party agent, his mother, prior to his confession, in conformance with the constitutional rules enunciated in *Edwards v. Arizona*."). Nowhere in his final brief, reply brief, or supplemental brief does Van Hook argue that his waiver of the rights to silence and to counsel was not knowing or intelligent under the totality of the circumstances.

have to be suppressed. *Edwards*, 451 U.S. at 484-85; *Whaley*, 13 F.3d at 967.

The record, however, shows more.

C

The facts in this case require us to resolve first the legal question whether a suspect can initiate discussions with police through a third party. The petitioner argues, under a plain reading of *Edwards*, that only the suspect "himself" can communicate a willingness and a desire to talk with the police (i.e., from the suspect's lips to the police's ears). We disagree.

There is no sound justification for reading the statement from *Edwards* that the suspect "himself" must initiate a discussion to imply the suspect, and only the suspect, can inform the police he wants to talk. The Supreme Court did not command in *Edwards* that a suspect must directly inform the police he wants to talk, as opposed to informing them through a third party. The propriety of communication through a third party was not before the Court in *Edwards*, nor has the Court taken up the issue since that decision. "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

While *Edwards* set out the general rule, the Court has, when faced with circumstances not addressed in that original decision, both extended the rule, *see, e.g.*, *Roberson*, 486 U.S. at 687-88 (concluding that *Edwards* applies when a police-initiated interrogation following a suspect's request

for counsel occurs in the context of a separate investigation), and restricted it, *see, e.g.*, *Davis*, 512 U.S. at 459-60 (concluding that *Edwards* does not apply when a suspect fails to unambiguously ask for a lawyer). As the Court explained in *Dickerson*, such refinement in the face of new circumstances is entirely appropriate: "No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by [cases extending and restricting *Miranda*] are as much a normal part of constitutional law as the original decision." 530 U.S. at 441.[4]

---

[4] The Supreme Court held in *Dickerson* that *Miranda* announced a "constitutional rule that Congress may not supersede legislatively." 530 U.S. at 444. Since that decision, there has been considerable disagreement over whether the Court intended to repudiate its earlier descriptions of *Miranda* as a "prophylactic rule" by adopting the "constitutional rule" description, or whether, instead, the two concepts are reconcilable. *Compare United States v. Patane*, 542 U.S. 630, 636 (2004) ("[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause.") (Thomas, J., announcing the judgment of the Court and an opinion joined by Chief Justice Rehnquist and Justice Scalia), *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) ("In the Fifth Amendment context, we have created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause.") (Thomas, J., announcing the judgment of the Court and an opinion joined by Chief Justice Rehnquist and Justices O'Connor and Scalia), *and Hannon v. Sanner*, 441 F.3d 635, 637 (8th Cir. 2006) ("The Court defined *Miranda* as a 'constitutional decision' announcing a 'constitutional rule,' but never described the *Miranda* safeguards as a 'constitutional right' equivalent to the Fifth Amendment itself. We thus view *Dickerson* as maintaining the

In determining how the general rule of *Edwards* applies to third-party communications, we begin with our standard for determining when a suspect initiates a discussion. In *Whaley*, this court held, "[A]n *Edwards* initiation occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case." 13 F.3d at 967 (reconciling the plurality and dissenting opinions in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983)). There is nothing inherent in "show[ing] a willingness and a desire" that restricts it to direct communication only. To show something means to manifest, demonstrate, or communicate something. One way to show or demonstrate something is by person-to-person communication. Another way is by person-to-person-to-person

---

status quo of the *Miranda* doctrine . . . ."), *with Chavez*, 538 U.S. at 788 n.3 (Stevens, J., dissenting) (arguing that "the Court disavowed the 'prophylactic' characterization of *Miranda*" in *Dickerson*), *Burgess v. Dretke*, 350 F.3d 461, 468-69 (5th Cir. 2003) ("In *Dickerson v. United States*, the Supreme Court changed its approach to *Miranda* and held that *Miranda* is a 'constitutional decision' rather than a mere 'prophylactic' requirement."), *and United States v. Talley*, 275 F.3d 560, 564 (6th Cir. 2001) (describing the *Dickerson* decision as holding "that the right to a *Miranda* warning is constitutionally based, rather than 'prophylactic'").

We decline to wade into the turbulent waters surrounding whether *Edwards* is also a "constitutional rule" and, if so, whether the Supreme Court's descriptions of the rule as a prophylactic should be jettisoned. *See, e.g., Cobb*, 532 U.S. at 175 (post-*Dickerson* description of *Edwards* as a "preventative rule") (Kennedy, J., concurring). As explained in *Dickerson*, even constitutional rules announced by the Court are subject to subsequent refinement.

communication. While the latter indirect communication may give rise to a question about the accuracy of the received message, any such question is alleviated when the ultimate recipient can ask the original declarant whether the received message is accurate. Thus, a suspect could, consistent with *Whaley*, communicate a willingness and a desire to talk with police through a third person. Whether the communication is direct or indirect is immaterial—what is important is the impetus for discussion comes from the suspect himself.[5]

We next consider how other courts have treated third-party communications. Van Hook has pointed to no decision where a court has concluded that a suspect cannot, as a matter of law, initiate a discussion with police through a third party. In fact, the decisions addressing this issue, while few in number, all support the validity of third-party communications. In *Owens v. Bowersox*, the police had arrested the defendant for murder and counsel

---

[5] Van Hook argues his interrogation was unconstitutional under *Whaley*. The facts of that case are, however, distinguishable. In *Whaley*, after the defendant arguably initiated a discussion with an ATF agent, "nothing happened for three weeks." 13 F.3d at 968. The court found that given the defendant "did nothing else during the succeeding three-week period, his actions certainly do not show a willingness and a desire to speak generally about his case." *Id.* In other words, the defendant's communication which arguably showed a willingness and a desire to talk had grown stale by the time the police acted on it. In the present case, it is undisputed Van Hook met with Cincinnati police the same day he was arrested—the same day he talked to his mother and decided to talk with police. *Infra* § III.E.

had been appointed. 290 F.3d 960, 962 (8th Cir.), *cert. denied*, 537 U.S. 1035 (2002). After his arraignment, a police detective picked up the defendant's mother and brought her to the police station. *Id.* During the drive, the mother told the detective that she talked to her son on the phone and persuaded him to tell the police the truth. *Id.* Once at the station, the detective told the defendant that he had been informed by the defendant's mother that he wanted to talk to police. *Id.* The defendant confirmed that the information was correct. *Id.* Before questioning, the detective read the *Miranda* rights to the defendant a second time. *Id.* The defendant confessed and was convicted of first-degree murder. *Id.* at 961.

On appeal, the Eighth Circuit considered whether the defendant's confession was obtained in violation of his Sixth Amendment right to counsel.[6] The state court had earlier found that the defendant did not contact the police himself nor did he ask his mother to have the police contact him. Nevertheless, the state court concluded that the initiation came from the defendant through his mother. The Eighth Circuit agreed there was no constitutional violation:

> Although the state's position undoubtedly would be stronger if [the defendant] himself had contacted the police, we do not believe that it was unreasonable for the state court to hold that a defendant may "evince" a willingness and desire to discuss the crime by

---

[6] In *Michigan v. Jackson*, the Supreme Court applied *Edwards* to the Sixth-Amendment context. 475 U.S. 625, 636 (1986).

> communicating with the police through a third party, especially a close relative. *See Holman* [*v. Kemna*], 212 F.3d [413,] 416, 419-20 [(8th Cir. 2000)] (defendant initiated contact with police by asking stepfather to have deputy come to prison to take his confession). Nor do we believe that relief under § 2254 may be granted to [the defendant] based on his failure to ask his mother specifically to send a police officer to the jail. Presuming, as the state court found, that [the defendant] told his mother that he wanted or was willing to talk to the police, we conclude that the state court's determination that Mr. Owens was the impetus behind the contact and thereby "initiated" the interrogation was not objectively unreasonable.

Id. at 963-64. The court denied the defendant's petition for habeas relief.

Other courts have also addressed the issue and likewise concluded a third party may communicate a suspect's desire to initiate a discussion. *See, e.g., United States v. Michaud*, 268 F.3d 728, 737-38 (9th Cir. 2001) (on direct appeal, finding that officers had the right to inquire whether a suspect was reinitiating communication when her cell-mate told a deputy she wanted to talk), *cert. denied*, 537 U.S. 867 (2002); *United States v. Gonzalez*, 183 F.3d 1315, 1323-24 (11th Cir. 1999) (on direct appeal, holding that the suspect initiated discussions with police through his wife), *cert. denied*, 528 U.S. 1144 (2000), *overruled on other grounds, United States v. Diaz*, 248 F.3d 1065 (11th

Cir. 2001); *United States v. Gaddy*, 894 F.2d 1307, 1310-11 (11th Cir. 1990) (on direct appeal, holding that the suspect initiated discussions with police through his aunt). The Georgia Supreme Court faced an analogous situation in *Harvell v. State*, 562 S.E.2d 180 (Ga.), *cert. denied*, 537 U.S. 1052 (2002). In that case, the defendant's mother told a police officer that her son was willing to make a statement. *Id.* at 182. The officer asked the defendant if this was true, and the defendant confirmed that it was. *Id.* The defendant was later convicted based on statements he made during the subsequent questioning. *Id.* On appeal, the Georgia Supreme Court held that the officer did not improperly reinitiate questioning and affirmed the conviction. *Id.* at 182-83.

In the instant case, a majority of the Ohio Supreme Court held that a suspect can initiate a discussion with police indirectly through a third party. *Van Hook*, 530 N.E.2d at 884, 887-88. Tellingly, even the dissenting Justices noted, "[T]here seems to be no reason why a defendant in custody could not initiate contact with the police through a third party." *Id.* at 894 (Wright, J., joined by Brown, J., dissenting). They dissented, rather, based on what they deemed an insufficient factual record. *Id.*

As these decisions illustrate, permitting a suspect to communicate a willingness and a desire to talk through a third party is consistent with the interest protected by *Edwards*. "[T]he purpose behind . . . *Miranda* and *Edwards*" is to "prevent[] government officials from using the coercive nature

of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987). It is the possibility of "badgering" and "overreaching" by police—i.e., government coercion—that *Edwards* is designed to guard against. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment . . . is governmental coercion." (emphasis added)); *see also Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("[T]he danger of coercion results from the interaction of custody and official interrogation."); *Michigan v. Harvey*, 494 U.S. 344, 353 (1990) ("Both *Jackson* and *Edwards* establish prophylactic rules that render some otherwise valid waivers of constitutional rights invalid when they result from *police-initiated* interrogation." (emphasis added)); *Jackson*, 475 U.S. at 636 ("We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."). This court explicitly stated this in *Whaley*: "[T]he whole point of *Edwards* is to prevent *officials* from badgering defendants into waiving their asserted right to counsel through repeated questioning." 13 F.3d at 968 (emphasis added).

If we were to prohibit a suspect from initiating a discussion with the police through a third-party, we would be crafting an artificial rule not required by the Constitution, as well as imposing an undue burden on our criminal-justice system. As the Supreme Court has recognized, "[T]he Fifth Amendment privilege is not concerned with moral

and psychological pressures to confess emanating from sources *other than* official coercion." *Connelly*, 479 U.S. at 170 (emphasis added, internal quotation marks omitted); *see also Perkins*, 496 U.S. at 296-97 ("There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess."). Suspects have no constitutional protection against friends or family members who convince them to talk with police. *Mauro*, 481 U.S. at 528 ("We doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way."); *Snethen v. Nix*, 885 F.2d 456, 457-60 (8th Cir. 1989) (finding no interrogation when a suspect's mother gained access to him by telling officers "if [my son] did this, he will tell me," and exhorted her son to confess so her other son would not be unjustly punished); *Plazinich v. Lynaugh*, 843 F.2d 836, 838-39 (5th Cir. 1988) (rejecting "an interpretation of *Edwards*' prophylactic rule that is divorced from the context of badgering police conduct from which the rule sprang"). The Constitution clearly forbids officials from using their "power of the sword" to coerce a suspect into making self-incriminating statements; it provides no similar protection against third-party cajoling, pleading, or threatening.

Moreover, as the Court has also recognized, "[T]he Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects." *Cobb*, 532 U.S. at 171-72. Both the majority and the dissent in *Minnick* noted the

importance of admissions of guilt in our criminal-justice system: "Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system." 498 U.S. at 155 (Kennedy, J., writing for the majority); "Admissions of guilt . . . are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* at 161 (Scalia, J., dissenting) (internal quotation marks omitted). The goal of our criminal-justice system—bringing criminals to justice—and the role of police-suspect discussions in meeting this goal are important considerations in deciding how to apply the general rule of *Edwards*. Courts must not create "'wholly irrational obstacles to legitimate police investigative activity.'" *Davis*, 512 U.S. at 460 (quoting *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)). *Cf. Moran v. Burbine*, 475 U.S. 412, 424 (1986) ("Because the proposed modification [by the defendant] ignores the underlying purposes of the *Miranda* rules and because we think that the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights, we decline the invitation to further extend *Miranda*'s reach.").

As for the benefits of a "'relatively rigid'" rule, *Roberson*, 486 U.S. at 681 (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)), recognizing initiation of discussions through third-party communications does not unduly dilute those benefits. All parties involved benefit to some extent from *Miranda* (and its corollary, *Edwards*):

> [It] has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

Minnick, 498 U.S. at 151 (quoting *Fare*, 442 U.S. at 718); *see also Roberson*, 486 U.S. at 681 (emphasizing the virtues of a bright-line rule); *Smith*, 469 U.S. at 94-95 (same). With third-party communications, the police are still prohibited from reinitiating questioning, and the impetus for reinitiation must still come from the suspect. The virtue of specifically identifying rights and duties is preserved: "police and prosecutors" still know "what they may do in conducting custodial interrogation" under *Edwards*—interrogate a suspect unless and until the suspect asks for a lawyer, and then not interrogate the suspect unless the suspect initiates a discussion (and waives the right to counsel); and "courts" still know "under what circumstances statements obtained during such interrogation are not admissible"—when the discussions are initiated by police. These players must simply bear in mind what is grasped by common sense and what has been the consistent rule of the post-*Edwards* case law—

initiation can be communicated directly by the suspect or indirectly by the suspect through a third party.

Although determining whether a suspect in fact initiated a discussion through a third party uses more judicial resources than a rule strictly forbidding such communications, the impact is minimal. As the paucity of cases addressing this issue suggests, see supra, this circumstance is the exception, not the norm. Moreover, if any institution has the specialized expertise to resolve, efficiently and effectively, this type of factual question, it is a trial court.[7]

One might ask why third-party communications should be permitted when a suspect could just communicate directly with the police. But that is the wrong question.[8] Rather, one should ask,

---

[7] Judge Cole principally relies on the advantages of "bright," "rigid" lines to justify a rule prohibiting communication through a third party. *See* Judge Cole's Dis. Op. at 16-17, 19-20. We whole-heartedly agree that bright, rigid lines in the law further many laudable interests. Yet, in creating the rule of *Edwards*, the Supreme Court could not expect that application of the rule would always and forever be mechanical and void of judgment. The Supreme Court, this circuit, and other courts have recognized whether a suspect has initiated a discussion can, in some instances, be a close call. *See, e.g.*, *Bradshaw*, 462 U.S. at 1045-46 (describing the suspect's question as "ambiguous"); *Whaley*, 13 F.3d at 966 (acknowledging some initiations will "present . . . difficult question[s]"). When drawing a bright line, a court cannot hope to eliminate each and every close call, but rather only to minimize them

[8] It is the wrong question because the Fifth Amendment right against self-incrimination, the Due Process Clause of the

why not? Initiation of a discussion through a third party does not contravene *Edwards* or its progeny. It is consistent with the purpose of *Edwards*—to protect against government coercion—as well as with our standard for determining whether a suspect has initiated a discussion. It furthers the interest in permitting suspects to talk with the police and advances the investigation for truth. It does not erode a suspect's protection against official coercion because the police must confirm whether the third-party communication is accurate before beginning any discussion or questioning. For these reasons, we conclude that a suspect can initiate a discussion with police through the communication of a third party.

D

Before reaching the question of whether Van Hook did, in fact, initiate a discussion, we briefly address a few of the arguments made in the dissenting opinions on the purely legal question of initiation under *Edwards*. In his dissenting opinion, Judge Cole argues that we ignore a "logical flaw" in the proposition that any suspect would actually communicate indirectly what could be communicated directly. Judge Cole's Dis. Op. at 16. According to the dissent, the suspect "does a strange thing" if he

---

Fourteenth Amendment, and the *Edwards* rule are not principally requirements foisted upon individuals, but rather restrictions imposed upon federal, state and local governments. The danger lies in government coercion, not a suspect's free choice. This distinction leads to a clear answer to the question—if a suspect chooses to "exercis[e] his free will," *Harvey*, 494 U.S. at 353, by communicating through a third party, courts have no business negating that communication.

tells someone like his mother that he wants to talk, rather than telling "the police" directly. *Id.* There is, however, nothing illogical or strange about it.

First, as we noted earlier, the issue of initiation through a third party has been addressed by courts in the past. Thus, strictly speaking, there is no logical, a priori flaw in recognizing that a suspect might choose to initiate through a third person—it has happened before.[9]

Furthermore, suggesting that it would be strange for a suspect to choose to initiate through a third party ignores the realities of many (if not most) detention centers. "The police" is not a monolith. Detectives and investigating officers do not typically act as guards roaming all day the areas directly adjacent to holding cells. If a suspect wants to initiate a discussion with an investigating officer, the suspect will frequently have to tell someone other than that officer. Of course, the suspect could just tell the nearest guard, who could then pass along the message to the investigating officer.

Yet, when a suspect talks with a guard or some other non-investigative member of the police and that person believes that the suspect wants to waive his right to counsel and so informs the investigating officer, the officer can be faced with

---

[9] Of course, from an empirical standpoint, courts may come across this circumstance only infrequently. This could explain the small number of decisions addressing the issue and could also belie the apocalyptic assertion that we are "eviscerating *Edwards*" today. *Cf. Oregon v. Elstad*, 470 U.S. 298, 318 n.5 (1985).

similar "'lost in translation' problems" as those identified by the dissent. Judge Cole's Dis. Op. at 18. For example, what if a suspect "speculate[s]" in front of a guard "about whether making a statement would ameliorate his situation"? *Id.* What if the guard then tells the officer this? Might not the officer want "to verify that a conversation between the suspect" and the guard "actually occurred"? *Id.* at 20. Might not the officer want to "prob[e]" the guard "about exactly what the suspect said" before launching into an interrogation? *Id.* Isn't there a danger a guard could "misinterpret[]" or in fact "ignore[]" what the suspect said or intended? *Id.* at 19. Restricting a suspect's freedom to communicate through a third party would not eliminate the practical risk of translation problems, regardless of the guard's role as part of "the police."

This leads to a further flaw in the dissent's reasoning. Is it really irrational to believe a suspect could decide to ask his mother (or some other third party) to tell the investigating officer that he wants to talk, rather than telling the nearest guard? From the suspect's perspective, who more likely has his best interests in mind—his mother or the guard? From the suspect's perspective, who more likely does he trust—his mother or the guard? From the suspect's perspective, who is more likely to keep his desire to talk secret from another co-suspect in the next jail cell—his mother or the guard? There are a host of reasons why a suspect could rationally choose to initiate through a third party rather than with a guard. In the end, the pertinent question is not *why* a suspect would ask a third party rather than a

guard to contact the investigating officer, but *whether* the suspect did so.

Next, it is asserted by the dissent that we create a "glaring asymmetry" with our decision today. *Id.* at 20. The asymmetry purportedly stems from a comparison of the right to invoke counsel, which cannot be made by a third person on behalf of a suspect, with our holding that a suspect can use a third party to initiate a discussion with the police. The existence of an asymmetry, however, is illusory—only by conflating initiation and waiver can one be imagined.

As we have explained, *supra* § III.B, there exist multiple steps to a valid waiver of the right to counsel, not just a showing of initiation by the suspect under *Edwards*. *United States v. Ware*, 338 F.3d 476, 481 (6th Cir. 2003) ("Although [the suspect] initiated the conversation, it is still necessary to determine whether he validly waived his rights to counsel and to remain silent."); *see also Bradshaw*, 462 U.S. at 1044-46 (plurality) ("But even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel,' is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation."), 1054 n.2 (dissent) ("If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the

existence of a knowing and intelligent waiver . . . ."); *Wernert v. Arn*, 819 F.2d 613, 615 (6th Cir. 1987).[10] The symmetrical opposite of *invoking* the right to counsel, Judge Cole's Dis. Op. at 20, is not initiating a discussion but rather *waiving* the right to counsel.

While a suspect's initiation might lead to a valid waiver of the right to counsel, it is not itself sufficient. Before the police can actually begin to interrogate a suspect after he has initiated, they must ensure that the suspect is knowingly and intelligently waiving the right to counsel under the totality of the circumstances. *See supra* § III.B. It is "wrong" to "think[] that an 'initiation' of a conversation or discussion by an accused not only satisfied the *Edwards* rule, but *ex proprio vigore* sufficed to show a waiver of the previously asserted right to counsel. The inquiries are separate, and clarity of application is not gained by melding them together." *Bradshaw*, 462 U.S. at 1045 (plurality). Simply put, nothing in our decision today permits the police to begin interrogating a criminal suspect simply by learning from a third party that the suspect is willing to waive the previously invoked right to counsel. Nor do we hold that a third party

---

[10] This is clear when, as here, the subsequent discussion between the suspect and the police is not "wholly one-sided." *Edwards*, 451 U.S. at 486 n.9. In the rare event when a suspect does offer the police an unprompted, monologue confession, there is no *Edwards* problem because "[a]bsent . . . interrogation, there would have been no infringement of the right that [the suspect] invoked and there would be no occasion to determine whether there had been a valid waiver." *Id.* at 486.

has the authority to somehow "bring[] about the waiver of that right," Judge Cole's Dis. Op. at 20, or otherwise "rescind[] th[e] request" for counsel, *id.* at 21. When the police receive information that a suspect wants to talk; when there is a sufficient basis for believing its validity; and when the police confirm with the suspect the validity of that information, we conclude that the suspect has adequately evinced a willingness and a desire to talk with them. Whether the suspect knowingly and intelligently waives his right to counsel is a separate question—a question, it bears repeating, we are not asked to answer today.[11]

Finally, we are urged today to devise a special set of rules governing initiation by a suspect through a third party. We decline the invitation. First, and most importantly, our judicial role is to rule on the case before us, not a hypothetical one that could come before us in the future. Furthermore, as the plurality in *Bradshaw* recognized, there is little wisdom in "build[ing] a superstructure of legal refinements around the word 'initiate.'" *Bradshaw*, 462 U.S. at 1045. Caution is especially apt where, as

---

[11] Nor does our holding today ask "too much" of law enforcement. Judge Cole's Dis. Op. at 20. Determining whether a suspect has knowingly and intelligently waived the rights to counsel and to remain silent under the totality of the circumstances can present questions much more daunting than those necessary in assessing the likely validity of a suspect's message from a third party. For example, what words must a suspect use to show that he is aware of the consequences of relinquishing his rights? What words must a suspect use to show that he is aware of the nature of the rights he is relinquishing? Is there a basis to believe the suspect does not understand his rights?

here, we have little from the text of the Constitution from which to draw such a set of rules. We leave to another day any further refinement of our holding which may be necessitated by a different set of facts than those presented here.

E

Having concluded that a suspect can initiate a discussion with police through the communication of a third party, we must take up the question whether Van Hook actually initiated a discussion with police through his mother. "Whether a suspect has [initiated a discussion] . . . can occasionally present a difficult question." *Whaley*, 13 F.3d at 966. In answering this question, we remain mindful of our limited role as a federal court reviewing the factual findings of a state trial or appellate court. *See* 28 U.S.C. § 2254(d) (pre-AEDPA); *Sumner*, 455 U.S. at 598; *Mapes*, 171 F.3d at 413; *Lundy*, 888 F.2d at 469. Although the prosecution had the burden of proof to show initiation at the suppression hearing, we presume on habeas review that the factual findings of the state courts are correct, and can set those findings aside only if the petitioner meets one of the eight conditions spelled out in 28 U.S.C. § 2254(d)(1)-(8) (pre-AEDPA). Specifically, subsection (8) states such findings are presumed correct unless they are "not fairly supported by the record" "as a whole." Moreover, when two different "conclusions find fair support in the record," a federal court may not "substitut[e] its view of the facts for that of the [state] [c]ourt." *Wainwright v. Goode*, 464 U.S. 78, 85 (1983); *see also Patton v. Yount*, 467 U.S. 1025, 1040 (1984) (explaining that even when "the cold

record arouses some concern," a federal court may not overturn the factual findings of a state court on habeas review).

Although the record is voluminous, the key parts of the record for our purpose are Van Hook's taped statement and the suppression hearing testimony of Det. Davis. Review of these confirms the following: Van Hook talked with his mother after his request for a lawyer but before he met with Det. Davis, JA 5209 (from Van Hook's statement); she told him to cooperate and tell the truth, *id.* (from Van Hook's statement); he decided to talk with police based on the talk with his mother, JA 5208-09 (from Van Hook's statement); Det. Davis spoke with Van Hook's mother before traveling to Florida, JA 3790 (from Det. Davis's testimony); she told him that she had spoken with her son, *id.* (from Det. Davis's testimony); based on that discussion, Det. Davis thought that Van Hook might want to talk to him, *id.* (from Det. Davis's testimony); Det. Davis told Van Hook that he had talked with his mother, JA 3783 (from Det. Davis's testimony); Van Hook confirmed to Det. Davis that he had talked with his mother and wanted to make a statement, *id.* (from Det. Davis's testimony); Det. Davis read Van Hook his *Miranda* rights, JA 5207-08 (from Van Hook's statement); Van Hook stated that he wanted to waive these rights, *id.* (from Van Hook's statement); and Van Hook confirmed to Det. Davis that he changed his mind after talking with his mother, JA 5209 (from Van Hook's statement). Van Hook raises no claim of error as to these matters.

He does, however, take issue with two related findings of the Ohio Supreme Court, namely (1) that Det. Davis spoke with Van Hook's mother *after* her son was arrested and asked for counsel, and (2) that she specifically informed Det. Davis that her son wanted to talk with him. On these two issues, the state court concluded:

> As previously indicated, Detective Davis's belief that appellant would want to talk to him occurred *after* and *because* of what appellant's mother had said to him. In the context of this conversation, both appellant and Detective Davis predicated their conversation upon what had been spoken with appellant's mother. It is most clear that appellant had agreed to act upon his mother's advice "to tell the truth" and thus to "make a statement." Obviously, this was the subject of appellant's conversation with his mother, and he communicated his agreement to do so to her. That this had been communicated to Detective Davis is quite apparent from the context in which the detective utilized the fact of his conversation with appellant's mother, i.e., as a basis for inquiring whether appellant indeed wished to make a statement. It would have had little meaning, particularly in light of appellant's response, unless both men understood that appellant's desire to make a voluntary statement had been communicated to Detective Davis through appellant's mother. . . . Our conclusion is further strengthened by the clarity with which appellant expressed his resolve to speak with

> police and his explanation that it was based upon discussions which he initiated with his mother. Furthermore, the decision to speak apparently had been reached earlier in the day, and thus well before he met with Detective Davis.

Van Hook, 530 N.E.2d at 887-88 (emphasis added).

We find no basis in the record to disturb these findings. Van Hook is correct that there is no direct evidence of when precisely Det. Davis spoke with his mother, or what precisely she said to him. (The line of questioning that could have provided the evidence was erroneously cut off by the trial judge at defense counsel's behest.[12]) Yet, the circumstantial evidence

---

[12] Following is the relevant excerpt from Det. Davis's testimony:

> Q. -- and the reason --. Had you had communication with Mr. VanHook's mother before going to Florida?
> A. Yes, sir.
> Q. And, had she indicated to you that she had talked to Mr. VanHook?
> A. She had.
> Q. And did she indicate to you anything that Mr. VanHook had told her?
> [Defense counsel]: To which I object.
> THE COURT: Objection will be sustained.
> Q. After speaking with Mrs. VanHook, did you think that Robert VanHook might want to talk to you?
> [Defense counsel]: To which I object.
> THE COURT: Overruled. you may answer that.
> A. Yes, I did.
> Q. And why was that?
> [Defense counsel]: To which I object.
> THE COURT: Just a moment. Objection overruled.

certainly supports the finding of the Ohio Supreme Court. Det. Davis testified that he spoke with Van Hook's mother before leaving for Florida and that, after their conversation, he believed her son might want to talk with him. If Van Hook's mother did not speak with Det. Davis after the arrest and tell him something that led the detective to believe her son might want to talk, there are two possible alternatives: (1) they spoke before his arrest about his wanting to talk with the police; or (2) they spoke before his arrest, but not about anything which would have led the detective to believe that her son might want to talk with the police—i.e., the detective testified falsely.[13] As to the former alternative, it strains credulity to suggest that Van Hook's mother informed the detective that her son might be willing to talk with the police before he was actually apprehended. Van Hook was, after all, actively fleeing from authorities until his arrest. As to the

---

A. She had told me --
THE COURT: Just a moment, sir.
A. I'm sorry.
THE COURT: My apologies. I sustained the objection rather than overruled. Pardon me.

JA 3790-91. Defense counsel's objections were presumably grounded on hearsay concerns. Hearsay, however, is admissible in a suppression hearing under Ohio Rules of Evidence 101(C)(1) and 104(A). *Van Hook*, 530 N.E.2d at 893.

[13] There are two other alternatives: (3) the two spoke after Van Hook's arrest, but not about her son wanting to talk with the police; or (4) the two never spoke. Alternative (3) contradicts Van Hook's own position that the two did not speak after his arrest. As for Alternative (4), Van Hook concedes that the two had spoken on numerous occasions before his arrest.

latter alternative, Van Hook has not shown by clear and convincing evidence that Det. Davis testified falsely. While the prosecution did have the burden of proof, any successful attack on Det. Davis's veracity could have been based on supporting testimony by the other parties to the conversation. For instance, Van Hook could have provided direct evidence that his mother did not tell the detective anything that would have led the detective to believe he wanted to talk by simply having her testify. Similarly, Van Hook himself could have testified at the suppression hearing (without jeopardizing his trial right to silence) and contradicted the detective's testimony. Yet, neither his mother nor Van Hook himself testified at the hearing. Review of the record confirms that the most plausible factual inference consistent with the record is the one made by the Ohio Supreme Court, and that inference is certainly not "unsupported" by the record nor has it been refuted by clear and convincing evidence.[14]

As to the particulars of the discussion between the mother and Det. Davis, the state court's conclusion that the content is nonetheless clear is also fairly supported by the record. Given the

---

[14] In his dissent, Judge Merritt likewise focuses on the lack of evidence establishing precisely when Det. Davis and Van Hook's mother spoke. Yet, viewing the record as a whole, there is absolutely no question Van Hook talked with his mother and, based on that conversation, changed his mind and wanted to talk with the police without a lawyer. On the most vital issue before us, the record is clear: prior to Det. Davis's arrival, Van Hook had formed a willingness and a desire to talk with the police without a lawyer.

realities of the custodial relationship, it is inevitable that the police will sometimes receive information from a suspect or a third party which *might* evince a willingness and a desire to talk by the suspect. For example, they may hear something like "Well, what is going to happen to me now?" (said by the suspect in *Bradshaw*, 462 U.S. at 1045) or that a suspect "needed to talk to somebody about a murder" (said by the cellmate of the suspect in *Michaud*, 268 F.3d at 735). In this type of situation, the police may "inquire whether [the suspect] was re-initiating communication." *Michaud*, 268 F.3d at 735-36 (citing *Bradshaw*, 462 U.S. at 1045-46). Det. Davis testified that, based on what the mother told him, he believed her son might want to talk to police. This was enough to justify a limited inquiry to confirm or disaffirm that belief.

For these reasons, we find no clear error in the Ohio courts' factual findings. Upon subjecting these findings and the other, undisputed facts outlined above to our legal standard for initiation, we conclude Van Hook did initiate a discussion with the police.

IV

The Constitution protects a suspect from official coercion—it does not protect a suspect from himself or his mother. Van Hook asked for a lawyer but later changed his mind and wanted to talk with the police, as he had the right to do. Whether he then directly told the police himself that he changed his mind or instead indirectly communicated it through his mother and subsequently confirmed it himself is of no constitutional moment. We

AFFIRM the district court's denial of habeas relief to Van Hook on the claim that his statement should have been suppressed.

Van Hook has raised several other claims of error which were not addressed by the original panel of this court. We return those claims to the panel for review and decision.

DISSENT

R. GUY COLE, JR., Circuit Judge, dissenting. The Court today adopts the position that law enforcement officers may renew contact with criminal suspects upon learning from third parties that the suspects are willing to waive their previously invoked right to counsel. In so holding, the majority concludes that neither reason nor established case law require suspects—who, by definition, are in jail surrounded at all times by law-enforcement personnel—to directly communicate to police their wish to waive their previously invoked constitutional rights. The Supreme Court has instructed us that we must view custodial waivers of rights with a high degree of suspicion. In my view, we must be doubly skeptical of a waiver of rights effected through the backdoor of a purported third-party agent, especially when all the suspect has to do is proclaim to the nearest guard, "I want to talk."

Because I believe that only the suspect or his attorney may initiate discussions with the police (defined broadly to include other corrections officers) after a suspect has invoked his right to counsel, I

respectfully dissent. Further, even assuming that third-party initiations are permissible, I disagree with the majority's conclusion that the record in this case establishes that Van Hook reinitiated communication with the police through his mother.

I.

A.

Edwards v. Arizona, 451 U.S. 477 (1981), creates the brightest of bright-line rules: If a suspect invokes his constitutional right to counsel, the police must immediately terminate their questioning. The interrogation may be renewed only if the suspect "himself" initiates further conversation "with the police." *Id.* at 485. There is no doubt that police officers who ask a suspect hours or days after the suspect invoked his right to counsel whether he was now ready to talk would be guilty of the very "badgering" that *Edwards* proscribes. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *see also United States v. Johnson*, 400 F.3d 187, 193-94 (4th Cir. 2005), *cert. denied*, 546 U.S. 886 (2005) (holding that police violated *Edwards* where an officer re-entered the interrogation room forty minutes after the suspect requested a lawyer to see if the suspect would waive his rights). Indeed, even if the police have reason to believe that a suspect is ready to waive his previously invoked rights, the police are prohibited from initiating contact with him. *See United States v. Rodriguez*, 993 F.2d 1170, 1174 (5th Cir. 1993) (concluding that the police improperly renewed questioning of the suspect where a co-defendant contacted the police to say that "they" wanted to speak but it was not clear to whom "they"

referred); *Desire v. Attorney Gen. of Cal.*, 969 F.2d 802, 804-05 (9th Cir. 1992) (holding that the police wrongly initiated contact where the officer overheard a conversation between the suspect and his co-defendant and in response, asked the suspect whether he "wanted to talk about anything"). Nonetheless, the majority holds that the police may do this very thing—ask a suspect whether he wants to talk after a suspect has invoked his right to counsel—without offending *Edwards*, so long as the police learn from a third party that the suspect is willing to submit to their questioning.

At first blush, there does not appear to be anything extraordinary or untoward about authorizing police to renew custodial interrogations when third parties, such as family or friends, tell the police that the suspect is prepared to answer questions without the assistance of counsel. But here we must pause and review what we know. The suspect has been taken into custody and has been read his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). He has terminated law enforcement's questioning by unambiguously invoking his right to counsel. He has preserved that right by maintaining his silence. At some point, according to the majority, the suspect changes his mind, perhaps while conferring with a family member or friend, and decides that he will waive his right to counsel after all. So committed to reversing course and so desirous of speaking is the suspect, that he does a strange thing: He does not tell the people that he wants to talk to, i.e., the police, that he wants to talk to them. He tells someone else, someone who is not a police officer.

The majority overlooks this logical flaw. Rather than concluding, as *Edwards* commands, that if a suspect genuinely wishes to waive his previously invoked right to counsel and answer law enforcement's questions, the suspect will so inform the police directly, the majority endorses the counter-intuitive proposition that we may treat a suspect as willing to talk to the police despite his silence to the police. *United States v. Michaud*, 268 F.3d 728, 741 (9th Cir. 2001) (Reinhardt, J. dissenting) ("The whole point of *Edwards* is that a suspect who has invoked her right to counsel may remain silent, and may not be questioned unless she breaks that silence . . .").

In addition to eviscerating *Edwards*, the majority's holding deviates from the clear import of the Supreme Court's jurisprudence on custodial interrogations. It is to that I now turn.

B.

As the majority correctly explains, *Miranda* and its "corollary," *Edwards*, have dual purposes, including safeguarding a suspect's exercise of his constitutional rights in the face of the state's disproportionate power and providing clear guidance to law enforcement in how to handle custodial interrogations. *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (describing *Edwards* as a "corollary" to *Miranda*). The majority further acknowledges that the Supreme Court has praised the "relativ[e] rigid[ity]" and "clear and unequivocal" nature of the *Miranda* and *Edwards* rules as one of their chief benefits. *Fare v. Michael C.*, 442 U.S. 707, 718 (1979); *Roberson*, 486 U.S. at 682. Indeed, "[t]he merit of the *Edwards* decision," according to the

Supreme Court, "lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990); *Roberson*, 486 U.S. at 680 ("As we have stressed on numerous occasions, one of the principal advantages of *Miranda* is the ease and clarity of its application.") (internal quotation marks and citation omitted).

Although the majority pays lip service to these precepts, it never comes to terms with their central place in the Supreme Court's custodial-interrogation jurisprudence. Coursing unmistakably through the Court's doctrine is the insistence that the relationship between a criminal suspect and his official interrogator be governed by "bright-line" rules that precisely spell out the rights and duties of both parties. *Roberson*, 486 U.S. at 681 ("We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*."); *Minnick*, 498 U.S. at 151 ("*Edwards* . . . implements the protections of *Miranda* in practical and straightforward terms."). The Supreme Court has determined that in this area of the law, neither suspect, nor police officer, nor the public at large, is well served by rules that tolerate ambiguity or require nuanced decisionmaking. The Court's unflagging commitment to "clarity" is motivated by the recognition that the coercive setting of custodial interrogation is ready-made for the infringement, whether intentional or inadvertent, of constitutional protections, such that suspects must be plainly advised of their rights so they may act on them. *See Dickerson v. United States*, 530 U.S. 428, 435 (2000) ("Because custodial police interrogation, by its very nature, isolates and pressures the individual, we

stated that 'even without employing brutality, the "third degree" or other specific stratagems, custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.'") (quoting *Miranda*, 384 U.S. at 455); *Bradshaw*, 462 U.S. at 1044 (describing *Edwards* as a "prophylactic rule" intended "to protect an accused in police custody from being badgered by police officers"). Furthermore, law enforcement must be advised about the limits of its authority, so that it is not subjected to judicial second-guessing as to its methods, or burdened by undue complexity in the discharge of its investigatory work. *Davis v. United States*, 512 U.S. 452, 461 (1994) (describing *Edwards* as providing "a bright line that can be applied by officers in the real world of investigation and interrogation . . ."); *Fare*, 442 U.S. at 718 (stating that the "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney . . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation . . ."); *Miranda*, 384 U.S. at 441-42 (describing one of the purposes of the decision as providing "concrete constitutional guidelines for law enforcement agencies and courts to follow").

The Supreme Court has steadfastly guarded the "bright-line" quality of the *Edwards* rule. The Court has applied *Edwards* to new factual scenarios where it deemed doing so necessary to uphold the rule's essential clarity, but has resisted applying *Edwards* where the result would be to muddy its dictates. Several cases illustrate the point.

In *Minnick*, the Court addressed whether *Edwards* is satisfied where the suspect has invoked his right to counsel and has been afforded an opportunity to consult with his lawyer prior to interrogation, but the lawyer is not physically present during the interrogation. The Court concluded that the ability to consult was insufficient to allow interrogation, in part because such an exception "would undermine the advantages flowing from *Edwards*' 'clear and unequivocal' character." 498 U.S. at 154. Suspects' rights would be jeopardized because the quality of consultations would vary widely, ranging from "a telephone call to say that the attorney is en route, to a hurried interchange between the attorney and client in a detention facility corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice . . . ." *Id.* at 155. Further, approving a consultation-only rule would entail unnecessary trouble for law-enforcement personnel: "[E]ven with the necessary scope of consultation settled, the officials in charge of the case would have to confirm the occurrence and, possibly, the extent of consultation to determine whether further interrogation is permissible." *Id.*

In *Davis*, the Court's decision was influenced in part by a desire to maintain the "clarity and ease of application" of the *Edwards* rule. 512 U.S. at 461. There, the Court held that a suspect's request for counsel must be unambiguous to trigger law enforcement's duty to terminate questioning. *Id.* at 459. The Court refused to require police to cease interrogation upon a suspect's ambiguous request for counsel because to do so would force police officers

"to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Id.* at 461; *see also Moran v. Burbine*, 475 U.S. 412, 425 (1986) (upholding a suspect's waiver of his rights where law enforcement failed to tell him that his lawyer attempted to reach him, because not upholding the waiver would "mudd[y] *Miranda*'s otherwise relatively clear waters" and "spawn" a host of legal questions).

Perhaps most telling is the Court's recent decision in *Dickerson*, reaffirming *Miranda*. The *Dickerson* Court confronted the question of whether *Miranda* had to yield to a Congressional statute that dispensed with *Miranda*'s required warnings by instead embodying a totality-of-the-circumstances test for assessing the voluntariness of a criminal defendant's confession. *Dickerson*, 530 U.S. at 428. In declining to overrule *Miranda*, the Court held that the popularly known "*Miranda* rights" had been broadly embedded in society. *Id.* at 443-44. In addition, *Miranda* constituted a rule that could be more easily administered by law enforcement, compared to the one enacted by Congress: "[E]xperience suggests that the totality-of-the-circumstances test which [the statute] seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Id.* at 444.

Thus, it is evident that the Supreme Court regards clarity and ease of application as necessary features of any legal rule governing custodial

interrogations and that the Court eschews proposed modifications that fail this test.

C.

To hold as the majority does today, that a suspect may re-initiate interrogation through a third party, contravenes the reasoning of the Supreme Court's custodial-interrogation jurisprudence by inviting the very uncertainty and complexity into the circumstances surrounding a suspect's waiver of his rights that the Court has sought to banish. This uncertainty and complexity ensnares both the suspect and the law-enforcement officers in charge of his case.

First, the majority's interpretation of *Edwards* allows the police to approach a suspect even when the suspect does not initiate further communication through a third party. While in custody, a suspect may have occasion to confer with family, friends, or other third parties. The suspect will have no reason to know that he could be opening himself up to renewed police contact if the third party misconstrues or ignores what he says and tells the police that the suspect is prepared to waive his right to counsel and talk with them. It does not take much imagination to realize the "lost in translation" problems that inhere, in the majority's preferred locution, in "person-to-person-to-person" communications. Maj. Op. at 6.

For example, during conversations with third parties, the suspect might equivocate in his decision not to speak with the police, might speculate about whether making a statement would ameliorate his

situation, and might even express agreement with advice encouraging him to tell the police what he knows. Even though such statements reveal no more than the suspect's current mental state, and hardly constitute a request for the police to re-start their interrogation, they could easily be passed on to the police, or interpreted by the police, as declarations of the suspect's desire to talk. Similarly, third parties' communications with the police may be colored by their own views as to what is in the suspect's best interests, and may not accurately reflect the suspect's own intentions on how to proceed.

The majority's reliance on cases from the Eighth, Ninth, and Eleventh Circuits upholding third-party initiations as permissible under *Edwards* only serves to illustrate the danger of such a rule. In *Owens v. Bowersox*, 290 F.3d 960 (8th Cir. 2002), *United States v. Gonzalez*, 183 F.3d 1315 (11th Cir. 1999), and *United States v. Gaddy*, 894 F.2d 1307 (11th Cir. 1990), there was no evidence about what the suspect said to the third party to make the latter believe that the suspect wanted to talk, nor was there any discussion of the accuracy and reliability of the third party's representations to the police. In *Michaud*, there was no evidence that the defendant told her cellmate that she wanted to talk to the police; the cellmate apparently concluded on her own that Michaud "needed to talk to somebody" as a result of Michaud's distraught state, and further concluded that a police officer was the necessary "somebody." *Michaud*, 268 F.3d at 739-40 (Reinhardt, J. dissenting).

While acknowledging the potential for errors in the transmission of information from the suspect to a third party to the police, the majority minimizes this concern by arguing that even if a suspect tells the police that he wants to talk, the corrections officer with whom the suspect initiates communication will seldom be the investigating officer assigned to his case. The majority therefore reasons that a suspect's desire to talk will almost invariably travel through a third party, namely, a third-party corrections officer. I agree. The majority is quite right when it says that "[d]etectives and investigating officers do not typically act as guards roaming all day the areas directly adjacent to holding cells." Maj. Op. at 10.

Where I part company with the majority is in its assumption that a suspect's communication to a law-enforcement officer, even one that is not assigned to his case, counts as an initiation through a third party. It makes no sense to say that a third-party corrections officer and a third-party family member, friend, or cell-mate are the same thing for purposes of applying *Edwards*. Indeed, a corrections officer is not a "third party" at all.

It goes without saying that the relationship between the suspect and the police—defined broadly to include corrections personnel beyond just the investigating officer—is adversarial. Is it possible, as the majority muses, that a suspect might make statements to a prison guard that the guard misinterprets as "evinc[ing] a willingness and a desire for a generalized discussion about the investigation"? *Bradshaw*, 462 U.S. at 1045-46. Of

course. But that is the risk the suspect takes when he voluntarily chooses to discuss his case with a law-enforcement officer. Such a situation does not involve a "third party" in the relevant sense because the suspect "himself" has initiated communication "with the police," even if he has not initiated communication directly with the investigating officer responsible for his case, which *Edwards*, on its face, does not require. For these reasons, the majority misses the mark when it contends that a suspect might prefer to initiate communication through his mother, rather than through his prison guard, because "[f]rom the suspect's perspective," his mother is the more trustworthy party. A suspect who tells his guard that he wants to talk is not initiating communication to the police "through" anyone; he is speaking directly to them.

As we have seen, the majority is not interested in examining the nature of the communication between the suspect and the third party, nor is it troubled by the way in which a suspect's intentions could be misinterpreted or ignored by a third party. Instead, the majority contends that any concerns about the accuracy of the communication from the suspect to the third party to the police can be easily put to rest by having the police confirm the suspect's "willingness and desire" to talk before renewing their interrogation. *Bradshaw*, 462 U.S. at 1045-46 (holding that an initiation occurs when a suspect makes a statement that evinces "a willingness and a desire for a generalized discussion about the investigation"); *United States v. Whaley*, 13 F.3d 963, 966 (6th Cir. 1994).

According to the majority then, once the police have learned from a third party that a suspect wishes to waive his rights and talk, the police may resume contact with the suspect to verify the third party's representation. The majority fails to explicate the content of this "limited inquiry" that law enforcement may conduct. More importantly, the majority turns the *Edwards* rule on its head by holding that a suspect initiates communication with the police only after the police ask him if he wants to talk: An initiation occurs "[w]hen the police receive information that a suspect wants to talk; when there is a sufficient basis for believing its validity; and *when the police confirm with the suspect the validity of that information*." Maj. Op. at 21-22 (emphasis added). As explained above, the police cannot approach a suspect to discuss the case unless an initiation by the suspect has already occurred. *Oregon*, 462 U.S. at 1039; *Johnson*, 400 F.3d at 187. It is the suspect's initiation that gives the police license to ask him if he is prepared to waive his rights and answer questions; police contact prior to an initiation, or for purposes of sparking an initiation, is a clear violation of *Edwards*. Thus, contrary to the majority's assertion, the better reasoned view is that a third-party initiation occurs, if at all, when the third party conveys to the police the suspect's alleged desire to talk without the aid of counsel.

Here we encounter the second layer of uncertainty and complexity that plagues third-party initiations, this time for law enforcement. The majority says that the police will have to have "a sufficient basis for believing" the third party's

representations before they may resume contact with the suspect. We are left to guess about what constitutes a "sufficient basis," and so are the police. Even though the Court's opinion lands law enforcement on uncertain terrain, the majority chooses not to spell out any rule to guide police conduct in responding to an alleged third-party initiation. Of course, any attempt to do so immediately runs afoul of the Supreme Court's admonition that the rules governing custodial interrogation should not put law-enforcement officers in the position of making "difficult judgment calls." *Davis*, 512 U.S. at 461. But that is exactly what will happen.

To overcome the "heavy" presumption against a custodial suspect's waiver of his rights, *Moran*, 475 U.S. at 450-51 (Stevens, J. dissenting), the prosecution will have to show that the police had a reasonable and good-faith basis for believing that the suspect communicated an intention to talk through the third party. This, in turn, will compel the police to verify that a conversation between the suspect and the third party actually occurred, and to assess the credibility and motivations of the third party. In addition, the police will have to examine the reliability of the purported waiver by probing the third party about exactly what the suspect said and in so doing, exercise their discretion in deciding whether the suspect's statements sufficiently express a "willingness and desire" to talk such that police may approach him. Among the more obvious questions that the majority's opinion will relegate to police officers include: Who may be regarded as a proper third party agent? What words must a

suspect use to show that he is prepared to waive his rights? Is it enough for the suspect to agree with a third party's recommendation that he talk, or must he affirmatively say that he "will" talk? What if the suspect says he will talk but never instructs the third party to so advise the police?

The Supreme Court instructed us in *Davis* that it is asking too much of law-enforcement officers to require them to assess whether a suspect is invoking his right to counsel even when the suspect is in the presence of police officers who can directly observe him and hear his statements first-hand. If that is the case, then I fail to see how it is not asking too much of law enforcement to assess a suspect's intention to waive his rights where that purported intention is not communicated openly to the police, but is relayed through a third party.

Ultimately, of course, the complicated questions surrounding third-party initiations will end up in the courts. To sort out the mess, courts will be compelled on a case-by-case basis to develop new standards for adjudicating the propriety of third-party initiations. In the end, we can safely conclude that the hallmark "clarity" and "certainty of [] application" of the *Edwards* rule will be lost. *Minnick*, 498 U.S. at 151.

D.

Finally, it cannot be ignored that the majority's opinion creates a glaring asymmetry in the law of custodial interrogations. A suspect cannot invoke his right to counsel through a third party. It would be impossible for a suspect to satisfy *Davis*'s

"unambiguous" requirement for invoking the right to counsel without the suspect himself telling the police that he wants a lawyer. *Davis*, 512 U.S. at 459 (stating that a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney"). Moreover, the Supreme Court has held that a suspect's own lawyer cannot protect his right to counsel for him. *Moran*, 475 U.S. at 425 (holding that the police were not required to refrain from questioning the suspect, even where the suspect's attorney contacted the police to ensure that he would not be questioned outside the presence of counsel, because the suspect himself did not tell the police that he wanted a lawyer).

Here, the majority adopts the opposite approach: A third party who could not invoke the accused's right to counsel may nonetheless play a crucial role in bringing about the waiver of that right. It makes no sense to apply different standards to the invocation of constitutional rights and the waiver of those same rights. Nonetheless, such is the paradox the majority has wrought.

The majority rejects this characterization on the grounds that "[t]he symmetrical opposite of '*invoking* the right to counsel,' is not initiating a discussion but rather *waiving* the right to counsel." Maj. Op. at 21 (emphasis in the original) (internal citation omitted). True, initiation alone does not amount to a waiver that enables the police to re-start their questioning. A suspect must both initiate communication with the police and knowingly and intelligently waive his

right to counsel. Although initiation and waiver are separate inquiries, a proper initiation (i.e., where the suspect initiates a dialogue with the police in which he expresses "a willingness and a desire for a generalized discussion about the investigation") is indispensable to finding a valid waiver. *Edwards*, 451 U.S. at 486, n. 9 (stating that the validity of the waiver depends on whether it was knowing and intelligent under the totality of the circumstances, "including the necessary fact that the accused, not the police, reopened the dialogue with the authorities"). Indeed, a knowing and intelligent waiver will not cure an improper initiation, i.e., an initiation at the behest of the police. As the Supreme Court stated in *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991), "[i]f the police do subsequently initiate an encounter in the absence of counsel . . ., the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards."

Thus, because initiation remains bound up with the suspect's waiver, and because the majority holds that the initiation can occur through a third party, the majority's opinion does indeed give third parties an authority to act on the suspect's behalf in bringing about the waiver of his constitutional rights that those same third parties are not accorded when it comes to invoking the suspect's rights in the first place. Under the majority's holding, the police may renew contact with a suspect based on a third party's representations that the suspect wants to talk without the aid of counsel. In contrast, the police

need not terminate their questioning based on a third party's representations that the suspect wants a lawyer. If the law demands that the suspect act on his own in requesting a lawyer, then I cannot fathom why he is any less competent to act on his own in rescinding that request, the necessary first step of which is initiating communication with the police.

II.

Having explained why allowing third-party initiations constitutes a departure from *Edwards* and the Supreme Court's custodial-interrogation jurisprudence generally, I turn now to the question of whether, even if *Edwards* did not prohibit third-party initiations, there is sufficient evidence to conclude that Van Hook initiated communication with the police through his mother.

The majority correctly notes that on habeas review, we presume that the factual findings of the Ohio Supreme Court are correct. We may set aside those findings only if one of the eight exceptions in 28 U.S.C. § 2254(d)(1)-(8) (the pre-AEDPA statute that governs our review) is satisfied. Van Hook argues that subsection (8) applies because the record does not support the Ohio Supreme Court's factual determination that he initiated communication with the police through his mother. I agree.

When Van Hook was apprehended by the Florida authorities on April 1, 1985, he invoked his right to counsel. That same day, the Florida police officers alerted Cincinnati Detective William Davis, who was in charge of the investigation into Self's murder, that they had taken Van Hook into custody.

Detective Davis and his Homicide Squad colleague, Kerry Rowland, immediately flew to Fort Lauderdale and went straight to the Broward County jail. There is no dispute that before he began his interrogation, Detective Davis knew that (1) Van Hook had invoked his right to counsel, (2) Van Hook himself did not contact either Cincinnati or Florida law-enforcement personnel to tell them that he wanted to talk, and (3) Van Hook did not ask anyone else to contact Detective Davis on his behalf to ask Detective Davis to come to the Florida jail. Despite these uncontroverted facts, the majority concludes that it was entirely consistent with *Edwards* for Detective Davis to have arranged for Van Hook's transfer to an interrogation room at the Florida jail, and once there, to have advised Van Hook that he and Detective Rowland "had a lot to talk to him about." No *Edwards* violation occurred, according to the majority, because on the day he flew to Fort Lauderdale, Detective Davis spoke to Van Hook's mother, who said something that made Detective Davis believe that Van Hook wished to speak with him.

Here the problems with third-party initiations discussed in Part I come alive. All the record establishes is that Detective Davis believed, after talking with Van Hook's mother, that Van Hook was willing to make a statement. We do not know what Van Hook's mother said to Davis that convinced Davis that Van Hook wanted to talk. We do not know, for instance, whether Van Hook's mother suggested to Davis that Van Hook would talk because (1) she had urged Van Hook to cooperate with the police, (2) her familiarity with her son and

his mental state led her to believe that he wanted to talk, or (3) Van Hook unambiguously told her that he wanted to confess. Van Hook's mother may have misconstrued his comments, she may have been speaking out of her own subjective beliefs and motivations, or she may have accurately reported Van Hook's statements, which may or may not have been sufficient to show Van Hook's "willingness and [] desire for a generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46. The point is that we do not know because the record is silent on these issues.

Similarly, we do not know what Van Hook said to his mother that prompted her to tell Detective Davis whatever she told him. Although Van Hook told Detective Davis in the Florida interrogation room, "I talked to my Mom today an' she jus' told me, you know, be cooperative an' jus' tell the truth," this statement tells us only what Van Hook's mother recommended that he do. It in no way establishes that Van Hook told his mother that he wanted to talk with the police, nor does it establish that he asked his mother to inform the police of his desire to talk.

The faulty factfinding of the Ohio Supreme Court in concluding that the record supported the proposition that Van Hook initiated communication through his mother did not go unnoticed by the dissenting members of that court. Justice Wright aptly summarized his colleagues' reasoning:

> There is not a scintilla of evidence in the record to show that the appellant initiated further discussion. The court justifies its

> holding by drawing one inference from another. It infers that the appellant initiated further discussion from the inference about what appellant's mother supposedly stated to Officer Davis. This is guesswork about facts which are not in the record. Such inference building undermines the constitutional foundations upon which *Bradshaw*, *Fields*, and *Edwards* . . . are built.

Ohio v. Van Hook, 530 N.E.2d 883, 894 (1988) (Wright, J., dissenting).

I believe that the Ohio Supreme Court's factual finding is not entitled to any deference from this Court because the evidence is not sufficient to show that Van Hook initiated communication with the police through his mother. Accordingly, I would grant Van Hook's petition for habeas relief.

III.

In holding that custodial suspects may initiate communication with the police through a third party other than his attorney, the majority today repudiates the only interpretation of *Edwards* that is consistent with the Supreme Court's custodial-interrogation jurisprudence. Applying its new rule, the majority infers, based on evidence that is not in the record, that Van Hook initiated communication with the police through his mother. Because I believe that the majority's endorsement of third-party initiations impermissibly heightens the risk of constitutional error, and that such an error has occurred in this case, I respectfully dissent.

DISSENT

MERRITT, Circuit Judge, dissenting. Judge Cole's opinion convinces me that once the accused has invoked his right to counsel, as here, the police may no longer interrogate him unless he either reinitiates interrogation himself directly or reinitiates interrogation through the counsel he has requested. After the accused has requested counsel, the police should not be able to importune him through relatives, friends, fellow inmates, prison guards or the press to subject himself to further interrogation. The Supreme Court has been strict in its enforcement of the *Edwards* rule.

Even if we permitted third party initiation, the State — at a minimum — would have to prove that (1) after invoking his right, the accused himself initiated contact on his own through a third person, (2) the third person contacted the police after the accused invoked his right, and (3) the waiver of the previously invoked right did not arise because the police encouraged the third person to convince the accused to break his silence and confess without counsel. The State has proved none of these elements in this case. There is no basis in the record before us for concluding (1) that Van Hook asked his mother to have the police contact him after he invoked his right, (2) that Van Hook's mother told the police that Van Hook had changed his mind after invoking his right and now wanted to talk, or (3) that the claimed waiver did not involve police efforts to

get Van Hook's mother to convince him to talk to them.

Detective Davis himself testified that neither Van Hook himself nor any third person on behalf of Van Hook had asked for renewed police contact:

> Q. And did you receive any information, either in your phone conversation with Detective Moody or upon your arrival in Ft. Lauderdale indicating that Mr. VanHook desired to talk to you?
>
> A. No.
>
> Q. So it's fair to say that when you arrived in Ft. Lauderdale, all you knew at that point was that Mr. Vanhook was in custody, is that correct?
>
> A. Correct.
>
> . . . .
>
> Q. But you knew when you went into that interview room that he had in fact requested to speak to an attorney, or indicated he would like to have an attorney present before speaking with members of law enforcement, is that correct?
>
> A. Yes, I was advised of that earlier by phone.
>
> Q. When you left Cincinnati for Ft. Lauderdale, you knew that Mr. VanHook had indicated that he did not wish to speak with police officers until after he had consulted with an attorney, is that accurate?

A. I knew that he did not want to talk to police officers at that time. At the time of his arrest.

Q. And at 9:35 [P.M.] on that April 1st then you advised him of his rights?

A. Correct.

Q. And this is after you advised him that you had a lot to talk about, he indicated he had talked with his mother, and that he wished to talk to you at that time?

A. Yes, sir.

Q. *And it's your testimony today that he didn't call or he didn't have anybody call you and say to come to the jail when you arrived in Ft. Lauderdale, that he wanted to talk with you?*

A. *That's correct.*

(Emphasis added, App. 370-81, 3784, 3785-86.)

Detective Davis had several telephone and in-person conversations with Van Hook's mother while Van Hook was on the lam in Florida. It may be that Detective Davis told Van Hook's mother before the police found and arrested Van Hook that she should get Van Hook to turn himself in and confess his crime. And it may be that when she talked to her son before and after he was arrested, that she told him that Davis wanted to talk to him and that he should "tell the truth." But there is nothing in the record at all to suggest that after invoking his rights Van Hook reinitiated contact with police through his mother. Detective Davis' testimony is to the

contrary. There is no fact or reasonable inference from a fact that Van Hook's mother even talked to the police after Van Hook invoked his right to counsel.

The majority opinion appears to claim that all of the Ohio Supreme Court conclusions are factual findings to which we are obligated to defer under § 2254(d)(8), title 28 (pre-AEDPA). This rendition of our standard of review does away with the normal rule that the application of a constitutional rule or standard to the facts is a mixed question of law and fact calling for *de novo* review. *See, e.g., Brown v. Allen*, 344 U.S. 443, 507 (1953) ("Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge"); *Miller v. Fenton*, 474 U.S. 104, 115 (1985) ("For several reasons we think it would be inappropriate to abandon the court's longstanding position that the ultimate question of admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review"). This same standard of review is used in many other areas of constitutional review of state action. *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 n. 27 (1984) ("The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review"); *Adams v. Turner*, 44 U.S. 590, 600 (Brandeis, J., dissenting); ("*Ex facto jus oritur* [the law arises out of the fact]. That ancient rule must prevail in order that we may have a system of living law.").

When we look at the record as a whole, including the police records showing contacts between Cincinnati police and Van Hook's family, and apply the constitutional rule to the facts, it is clear that there was no contact between Cincinnati police and Van Hook's mother or family on the day of Van Hook's arrest, or any reinitiation by Van Hook through anyone else.

Counsel for Van Hook reports in his brief pages 10-11 an "exhaustive examination" of police records of all contacts with Van Hook's family during their successful efforts to find him and have him arrested in Florida:

> An exhaustive examination of the Cincinnati Police Department's file on Robert Van Hook reveals no mention is made in 776 pages of police records, reports, and notes (contained in the joint appendix) to any conversation between Van Hook's mother and police between the time Van Hook requested counsel and police reinitiated interrogation in violation of *Edwards*. (Police Records, Apx. Vol. 14-15, pp. 4780-5554).
>
> The records of the Cincinnati Police Department detail conversations with Van Hook's mother on seven separate occasions: (1) Officer Davis has Detective Weber call Van Hook's mother on 2/26/85 (*Id.* at Vol. 14, pp. 4897, 5171); (2) Officer Davis has Detective Weber call Van Hook's mother on 3/5/85 (*Id.* at 4914); (3) Officer Davis has Michael Ramsey call Van Hook's mother on 3/5/85 (*Id.*); (4) Van Hook's mother calls Detective Weber on

> 3/11/85 (*Id.* at 4919, 5174); (5) Officers Hennekes, Davis, and Rowland speak with Van Hook's mother at her house on 3/13/85 (*Id.* at 4922-24); (6) Officers Hennekes and Davis return to Van Hook's mother's house and put tracer on her phone on 3/14/85 (*Id.* at 4928); and (7) Officer Hennekes receives a call from Van Hook's mother on 3/21/85 (*Id.* at 4935).
>
> The Cincinnati police file indicates a subpoena was issued for Van Hook's mother's phone records 3/7/85 (*Id.* at 4917). And Van Hook's mother's phone records are included in the police file as well. (*Id.* at Vol. 15, pp. 5348-55). The file also includes references to phone calls with Van Hook's step-mother 3/6/85 (*Id.* at Vol. 14, pp. 4930-31). Van Hook's father 3/7/85 (*Id.* at 4931), and van Hook's uncles 3/7/85 (*Id.* at 4916). Yet, conspicuously absent from the 776 page file of the Cincinnati Police Department is any mention of a conversation with Van Hook's mother on the day of his arrest.

The majority does not even mention these records, Detective Davis' testimony or their effect on the State's claim that Van Hook reinitiated contact with the police through his mother. The majority's treatment of the case does not fall within any bright line rule based on *Edwards*, nor the more general *Edwards* standard that we "should indulge every reasonable presumption against waiver of fundamental constitutional rights" and that "doubts must be resolved in favor of protecting the

constitutional claim," and that "it is the State that has the burden of establishing a valid waiver." *Michigan v. Jackson*, *supra*, 475 U.S. 625, 633 (1986), a case applying the reasoning of *Edwards*. The majority refuses to apply this standard or observe the admonition of the Supreme Court in *Michigan v. Mosley*, 423 U.S. 96, 110 fn. 2 (1975):

> [T]he reason to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

DISSENT

BOYCE F. MARTIN, JR., Circuit Judge, dissenting. I join the well-reasoned dissents of Judges Merritt and Cole. Both properly highlight the fundamental tenet of *Edwards v. Arizona*: that once a suspect asserts his right to counsel, he cannot be subject to further interrogation "until counsel has been made available to him, unless *the accused himself* initiates further communication, exchanges,

or conversations *with the police*." 451 U.S. 477, 484-85 (1981) (emphasis added).

I fully agree with the majority that when faced with an issue or set of circumstances that the Supreme Court did not address in its original decision, we may modify, extend, or restrict its ruling. I disagree with the majority, however, in its position that we may modify a ruling where the Supreme Court has already provided explicit language to guide us. And *Edwards* clearly explains that any re-initiation must be communicated by "the accused" to "the police."

To the extent that the majority's holding could be a defensible interpretation of *Edwards*, any arguments in its favor are completely undermined by the fact that its ruling is utterly impractical. The majority fails to provide a workable rule of uniform application. The test set forth by Judge Merritt in his dissent provides much more practical guidance for future panels of this Court and district courts faced with the issue of third party initiation. There is no reason why this test cannot at least inform future adjudication of cases involving this issue. Judge Cole's concern for the distinct probability of a suspect's communications to third parties becoming "lost in translation" further underscores the impracticality of today's decision. The Court's ruling does not merely amount to further erosion of *Miranda*, but the creation of a legal framework that is doomed to breed uncertainty and confusion.

For these reasons, I respectfully dissent.

APPENDIX F

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0140p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT VAN HOOK,

Petitioner-Appellant,

v.

CARL S. ANDERSON, Warden,

Respondent-Appellee.

No. 03-4207

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 94-00269—George C. Smith, District Judge.

Argued: December 6, 2005

Decided and Filed: April 18, 2006

Before: MERRITT, MARTIN, and MOORE, Circuit Judges.

COUNSEL

ARGUED: James D. Owen, Columbus, Ohio, Keith A. Yeazel, Columbus, Ohio, for Appellant. Stephen E. Maher, ATTORNEY GENERAL'S OFFICE OF

OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee. **ON BRIEF:** James D. Owen, Columbus, Ohio, Keith A. Yeazel, Columbus, Ohio, for Appellant. Stephen E. Maher, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.

OPINION

MERRITT, Circuit Judge. This is a habeas petition filed pursuant to 28 U.S.C. § 2254 after petitioner, Robert Van Hook, was convicted by a three-judge panel of capital murder and aggravated robbery. We reverse the judgment of the district court and remand on the ground that Van Hook's constitutional rights were infringed when Cincinnati police started an interrogation anew with Van Hook after he had requested legal counsel in clear violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). The police bungled an otherwise strong case. As a result of this violation, Van Hook's subsequent incriminating statements and confession should have been suppressed.

We will briefly recount the facts of the brutal murder that led to Van Hook's arrest. Petitioner Robert Van Hook went to a Cincinnati bar largely patronized by male homosexuals in February 1985. While there, he drank and talked with David Self. The two left together and Self told the bartender that they were planning to go to Self's apartment. Once at the apartment, and after Self approached Van Hook in a sexual manner, Van Hook strangled Self into

unconsciousness. Van Hook then took a knife from the kitchen, diabolically stabbed Self so that Self's internal organs were visible and then placed several items in the victim's body. He stole several items from Self's apartment and smeared his bloody fingerprints in an attempt to destroy any evidence. He then went to a friend's house, but eventually left town for Ft. Lauderdale, Florida, where he was arrested two months later. While in custody at the Florida jail, Van Hook made a full and graphic confession, which included an admission to the killing of David Self as well as to the robbery. *See State v. Van Hook*, 39 Ohio St. 3d 256, 530 N.E.2d 883 (1988). The events at the Florida jail that led to the confession will be discussed in detail below.

Van Hook has never denied killing Self, but he maintains he did so in a rage precipitated by the sexual advances of Self and as the result of a severe borderline personality disorder that caused him to lack the requisite intent to make him guilty of aggravated murder or eligible for the death penalty. Temporary insanity was the basis for Van Hook's defense at trial. The state maintains that Van Hook left the bar with the intention of robbing Self. The three-judge panel that tried Van Hook rejected his defense and convicted him. He was later sentenced to death. After direct and postconviction review by the Ohio courts and denial of the writ by the district court, Van Hook appealed to our Court, raising multiple issues, only one of which will be discussed herein.

I.

Our decision to reverse the district court and issue the writ is based on the failure to suppress Van Hook's incriminating statements after police improperly reinitiated contact with him after he had requested counsel. The district court rendered its initial decision on this issue in response to Van Hook's motion for partial summary judgment. *Van Hook v. Anderson*, No. C-1-94-269 (S.D. Ohio Mar. 28, 2002). It reaffirmed this decision without substantial further discussion in its final order dated August 7, 2003, from which Van Hook appeals.[1]

It is well-settled that once having expressed a desire to law enforcement officials to consult an attorney, an accused is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Abela v. Martin*, 380 F.3d 915, 925 (6th Cir. 2004) (noting that *Edwards* establishes a bright-line rule to cease interrogation once an accused's *Miranda* right to counsel is invoked). In *Edwards*, the Supreme Court established a bright-line rule that once a suspect is in custody and

---

[1] Van Hook's habeas petition was filed prior to passage of the Anti-terrorism and Effective Death Penalty Act, and we, therefore, review his claims under the law as it existed before enactment of AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 322-27 (1997). Under the applicable standard of review, findings of fact made by the state court are presumed correct unless "clear and convincing" evidence demonstrates error and questions of law or mixed questions of law and fact are reviewed *de novo*. *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999).

invokes the right to counsel, law enforcement may not further interrogate him until counsel has been made available, or unless the suspect initiates further conversations or exchanges with the police. The Supreme Court has broadly defined interrogation as any exchange between police and a suspect in custody reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 n.7, 302, n.8 (1980). Supreme Court cases decided subsequent to *Edwards* confirm the paramount importance of a defendant's right not to be questioned without counsel after invocation of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Smith v. Illinois*, 469 U.S. 91, 98 (1984) (purpose of the rule formulated in *Edwards* is to prevent police "badgering or overreaching—explicit or subtle, deliberate or unintentional"); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) (holding that police may not question a defendant about any unrelated crimes after invocation of the right to counsel, even if such crimes are the subject of a separate investigation); *Minnick v. Mississippi*, 498 U.S. 146, 152 (1990) (holding that after invocation of the right to counsel, police may not reinitiate interrogation without counsel present); *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (noting that the *Edwards* rule is designed to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights"). Therefore, under *Edwards*, initiation of conversation is permissible only when, "*without influence by the authorities*, the suspect shows a willingness and a desire to talk generally about his case." *United States v. Whaley*, 13 F.3d 963, 967 (6th Cir. 1994) (emphasis added).

The determination of whether an *Edwards* initiation has occurred is a legal issue. *Id.* at 968. The state bears the burden of proving that a defendant "voluntarily, knowingly, and intelligently waived his right to silence and counsel." *Abela*, 380 F.3d at 928; *United States v. Bentley*, 726 F.2d 1124, 1126 (6th Cir. 1984).

The *Edwards* rule finds its genesis in *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Supreme Court held that the police must advise a suspect of his right to counsel and, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. In *Edwards*, a Fifth Amendment case, the Court explained that "it is inconsistent with *Miranda* and its progeny for authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards*, 451 U.S. at 485. In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court extended the *Edwards* rule to the Sixth Amendment context.

If the police subsequently initiate an encounter in the absence of counsel, and there has been no break in custody, the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. *McNeil v. Wisconsin*, 501 U.S. at 177. Police officers may not continue to question a suspect despite his request for counsel "in the hope that [he] might be induced to say something casting retrospective doubt on his initial statement that he wished to speak

through an attorney or not at all." *Smith*, 469 U.S. at 99 (internal quotation marks and citation omitted). This prohibition applies to *all officers*, not just those present when the suspect invoked his right to counsel. *Arizona v. Roberson*, 486 U.S. at 687-88 (citation omitted) (emphasis added).

Based on this line of authority, Van Hook filed a motion to suppress all statements he had made to law enforcement subsequent to his arrest, including the taped confession he made to the Cincinnati police in the Florida jail. At the suppression hearing, it was established that Van Hook was given his *Miranda* rights by a Florida detective after he was arrested and in custody at the Florida jail. It was established at the hearing that Van Hook asked for an attorney, whereupon the Florida police ceased asking him questions because they believed he "didn't want to say anything without an attorney." Upon their arrival at the Florida jail later that day, the two Cincinnati detectives knew that Van Hook had invoked his right to counsel and that the Florida detectives had therefore ceased questioning him. Transcript of Suppression Hearing at 15-16, *Ohio v. Van Hook*, No. B-851389/C-850565 (Court of Common Pleas, Hamilton County, June 17, 1985).

The conversation between the Cincinnati detectives and Van Hook began by discussing extradition procedures and informing Van Hook that they intended to return to Cincinnati with him the next day – proper topics of discussion with a defendant who has requested, but not yet consulted, counsel. However, the conversation did not end

there. Detective Davis of the Cincinnati homicide squad testified at the suppression hearing:

> [W]e advised [Van Hook] we had a lot to talk to him about. I advised him I had been in contact with his mother, I advised him that we could not talk to him unless he wanted to talk to us and make a statement.

Transcript of Suppression Hearing at 14, *Ohio v. Van Hook*, No. B-851389/C-850565 (Court of Common Pleas, Hamilton County, June 17, 1985). However, Detective Davis also testified that although he did tell Van Hook that "we could not talk to him unless he wanted to talk," he did not tell Van Hook that he could not question him because Van Hook had requested counsel. *Id.* at 20. Detective Davis also testified that he had not received any direct communication that would indicate that Van Hook desired to speak with him or any law enforcement official:

> Q. Okay. And did you receive any information, either in your phone conversation with Detective Moody [of the Ft. Lauderdale police] or upon your arrival in Ft. Lauderdale indicating that Mr. Van Hook desired to talk to you?

An objection was made and overruled. The question was read again and Detective Davis answered "No." *Id.* at 11-12. It was also demonstrated at the suppression hearing that Cincinnati officials had contacted Van Hook's mother in order to obtain information on Van Hook's location and to obtain her

assistance in inducing Van Hook to talk to police. The state trial court denied the motion to suppress and Van Hook's taped confession came in at trial.

The Ohio Supreme Court concluded that the trial court had not erred when it refused to suppress Van Hook's statement because "the record demonstrates that appellant himself reinitiated his own interrogation through a third party." *State v. Van Hook*, 39 Ohio St. 3d at 259, 530 N.E.2d at 886. It held, and the district court below agreed, that when Detective Davis told Van Hook that he, Davis, had been in contact with Van Hook's mother and that "we had a lot to talk to him about," these words demonstrated on the part of Van Hook a "willingness and desire, through his mother" to talk to police. This finding is not supported legally or factually.

The Supreme Court has directed that two elements be examined to determine whether the police have obtained a statement in violation of *Edwards*' "rigid prophylactic rule." *Smith*, 469 U.S. at 95 (internal quotation marks and citation omitted). First, a court must "determine whether the accused actually invoked his right to counsel" in a clear and unambiguous manner. *Id.*; *see also Davis v. United States*, 512 U.S. 452, 459 (1994). If it is clear that counsel was requested, the court must determine who initiated the further discussions that yielded the eventual statement. *Smith*, 469 U.S. at 95. If an accused, after invoking his right to counsel, did not "initiate[ ] further discussions with the police," any statement procured by the police is inadmissible at trial. *Id.*

Turning to the requirement under *Edwards* that the request for counsel be unambiguous, all the courts, state and federal, that have reviewed this case have found no question to exist as to whether Van Hook invoked his right to counsel. As the district court stated, "there is no question that [Van Hook] invoked his right to counsel, that the Cincinnati police knew he had invoked his right to counsel, and at no time prior to speaking with the Cincinnati police was [Van Hook] furnished with counsel." Order at 7, *Van Hook v. Anderson*, C-1-94-269 (S.D. Ohio Mar. 28, 2002). Therefore, the sole question before us is whether Van Hook reinitiated contact with the police through a conversation with his mother.

There is much speculation of what Van Hook's mother said to Detective Davis.[2] Under our reading of Edwards, it is unnecessary to know what transpired in that conversation. It is undisputed that Van Hook *himself* did not initiate contact with the police: there "is not a scintilla of evidence in the record to show that [Van Hook] initiated further discussion" with police. 39 Ohio St. 3d at 266, 530 N.E.2d at 892 (Wright, J., dissenting). Relying on the plain language from *Edwards* that the *accused*

---

[2] We do not know exactly what was said between Detective Davis and Van Hook's mother because at the suppression hearing the court sustained objections by Van Hook's counsel relating to the conversation between Detective Davis and Mrs. Van Hook, thereby limiting the amount of information that came in about the conversation. The Ohio appellate courts found this omission to be in error because hearsay is allowed at suppression hearings.

himself must reinitiate discussions, we agree with Van Hook's argument that no one but a suspect himself can initiate further discussions with police after counsel has been requested but not yet furnished. Because Van Hook did not initiate the conversation himself, his constitutional rights were violated and the incriminating statements he made in the Florida jail must be suppressed.

The evidence here shows that Van Hook did not initiate conversation with the police. Rather, he gave a statement only after Detective Davis told him that he, Davis, had spoken with his mother, and they "need[ed] to talk." In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Supreme Court explained that the bright-line, prophylactic *Edwards* rule protects against the inherently compelling pressures of custodial interrogation by creating a presumption that any subsequent waiver of the right to counsel at the authorities' behest was coercive and not purely voluntary. *Id.* at 685-86. Moreover, the Supreme Court expressly rejected the contention that the fresh issuance of *Miranda* warnings, after the suspect requested counsel, would overcome the pressures created by the custodial nature of the situation. *Id.* at 686; *see also United States v. Hall*, 905 F.2d 959, 961, 964-65 (6th Cir. 1990) (holding that once an accused expresses a desire to deal with police only through counsel, a presumption is created that any subsequent waiver of the right to counsel at the authorities' behest is coercive and not purely voluntary and relying on *Roberson* to reject the proposition that "a fresh set of *Miranda* warnings would reassure a suspect who had been denied counsel that his rights would remain untrammeled").

II.

Because we hold that it was error to admit Van Hook's statements, we must "review[ ] the remainder of the evidence against [him] to determine whether the admission of the confession was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). A confession can be "the most probative and damaging evidence that can be admitted against [a defendant]." *Id.* at 296 (internal quotation marks and citation omitted). In his authoritative concurrence in *Brecht v. Abrahamson*, 507 U.S. 619, 641 (1993), Justice Stevens adopted the applicable standard of harmless error from *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), which requires that if "one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Because Van Hook's statements were self-incriminating and among the most significant evidence marshaled against him by the state, we do not find their admission into evidence harmless. Because we "cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error" of admitting Van Hook's unconstitutionally obtained statements, we find that the constitutional errors in this case are not harmless, and accordingly, we grant Van Hook's request for habeas relief on this ground. All other issues are pretermitted.

We reverse the judgment of the district court and remand with instructions that Van Hook be released from state custody if not retried by the State

of Ohio within 180 days of the final federal court judgment in this case.

Accordingly, it is so ordered.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-1-94-269
Judge Smith
Magistrate Judge Abel
Filed: August 7, 2003

ROBERT VAN HOOK,

Petitioner,

v.

CARL ANDERSON, Warden,

Respondent.

OPINION AND ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is before the Court for final judgment on the merits.

I. Introduction

Petitioner began these habeas corpus proceedings on April 5, 1994 when he filed a notice of intention to file a habeas corpus petition. Between June 1994 and May 1995, this case was administratively closed to permit petitioner to exhaust his state court remedies. Afer filing his

original habeas corpus petition on October 10, 1995, petitioner embarked on a period of discovery. Petitioner subsequently filed an amended habeas corpus petition on April 29, 1997, (doc.no. 58). Petitioner raised the following grounds for relief:

> Ground A: The trial court erred to the prejudice of Robert Van Hook in failing to suppress his statement to members of the Cincinnati Police Department in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.
>
> Ground B: The trial court erred when it failed to suppress Robert Van Hook's involuntary statement to the Cincinnati Police Department in violation of the Fifth, Sixth, and Fourteenth Amendments.
>
> Ground C: The process of selecting venire persons and grand jury forepersons to serve on grand juries in Hamilton County was tainted in 1985 due to consideration of the factor of race in the drawing, selection, and empanelment of grand jurors in violation of the Fifth, Sixth, and Fourteenth Amendments.
>
> Ground D: The trial prosecutor failed to provide Robert Van Hook with all relevant, material, and exculpatory evidence during pretrial discovery proceedings. This failure violated Mr. Van Hook's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ground E: Petitioner was denied Effective Assistance of Counsel, and his Confrontation, Due Process, and Equal Protection rights, when his Trial Counsel failed to obtain, and the Trial Court failed to provide, access to mental health experts to establish petitioner's insanity at the time of the offense, to provide evidence in mitigation of punishment, to rebut erroneous expert medical testimony about the nature of petitioner's mental condition, including an erroneous description of his Borderline Personality Disorder.

Ground F: The trial court's failure to disseminate the Addendum to Dr. Schmidtgoessling's insanity report violated Robert Van Hook's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Ground G: The actions of trial counsel deprived Petitioner Van Hook of his right to the effective assistance of his counsel during the innocence-guilt phase of his case in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ground H: The State's use of an informant deprived Robert Van Hook of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

Ground I: The presence of Judge Bettman on the three judge panel that decided Robert Van Hook's case violated petitioner's rights as

guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Ground J: The petitioner is factually innocent of aggravated murder with death penalty specifications.

Ground K: The actions and omissions of Robert Van Hook's counsel during the mitigation phase of his case deprived petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Ground L: The trial court's numerous errors in the admission of evidence during the mitigation phase denied Petitioner Van Hook his rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

Ground M: Prosecutorial misconduct during all phases of the trial denied Petitioner Van Hook his rights to a fair trial, due process of law, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ground N: Petitioner Van Hook was deprived of his right to the effective assistance of counsel at the direct appeal stage in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ground O: The statutory provisions governing the Ohio capital punishment scheme violate

the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, Article VI of the United States Constitution, and various international laws and treaties.

Ground P: The policies, procedures, and practices of the Hamilton County Prosecutor's Office and Hamilton County Judicial system in seeking, securing, and imposing capital convictions and death sentences violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ground Q: The policies and procedures adopted and employed by the Hamilton County Prosecutor's Office in conjunction with the Hamilton County Common Pleas Court and Court of Appeals in summarily dismissing capital state postconviction petitions and the refusal of the Ohio state courts to follow the statutorily mandated process for redress for those convicted violates the guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

On January 19, 2001, the Court issued an *Opinion and Order* concluding that several of these grounds were barred by procedural default, absent a colorable showing by petitioner of cause and prejudice to excuse the default: grounds C, D, I, J, L, M, N, and P. (Doc.No. 94). Petitioner raised cause and prejudice arguments as to some of those grounds, and expressly abandoned the others. In an

Opinion and Order dated March 28, 2002, the Court concluded, among other things, that petitioner had failed to establish cause and prejudice to excuse the default of the appellate counsel ineffectiveness claims set forth in ground N. (Doc.No. 109). That being so, petitioner may not offer appellate counsel ineffectiveness as cause and prejudice for the default of any of his constitutional claims, *Edwards v. Carpenter*, 529 U.S. 446 (2000). Thus, the constitutional claims set forth in grounds C, D, I, J, L, M, N, and P will be DENIED.

Following the Court's *Opinion and Order* of January 19, 2001 addressing procedural default, petitioner filed a motion for partial summary judgment on grounds A, D and F, E, K, and N. On March 28, 2002, the Court issued an Opinion and Order concluding that all of those grounds were without merit and denying petitioner's motion for partial summary judgment. (Doc.No. 109). Thus, the constitutional claims set forth in Grounds A, D and F, E, K, and N have been DENIED.

The issue before the Court, therefore, is whether any of the following grounds warrant habeas corpus relief: ground B (trial court's failure to suppress petitioner's allegedly involuntary statement to police); ground G (trial counsel ineffectiveness during culpability phase); ground H (state's use of an informant); ground O (constitutionality of Ohio's death penalty statutes); and ground Q (policies and procedures in Hamilton County resulting in summary dismissal of capital postconviction actions). Petitioner filed a merit brief on May 14, 2001, (doc.no. 100), and respondent filed

a merit brief on June 6, 2001, (doc.no. 101). Petitioner filed a reply brief on the merits on June 22, 2001, (doc.no. 102). This matter is now ripe for review.

II. Discussion

The habeas corpus statutes were amended, effective April 24, 1996, by the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"). Because petitioner filed his habeas corpus action more than a year before the effective date of the AEDPA, this Court's review of petitioner's constitutional claims is governed by habeas corpus law as it existed prior to the enactment of those amendments. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). That is, state court findings of fact are presumed correct, unless petitioner rebuts that presumption of correctness by clear and convincing evidence; questions of law, as well as mixed questions of law and fact, are reviewed *de novo* by this Court. *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999). With these principles in mind, the Court will consider each of the constitutional claims that is properly before the Court for review on the merits.[1]

---

[1] In his Merit Brief, petitioner included a discussion of the standards governing evidentiary hearings in federal habeas corpus. Petitioner did not expressly request an evidentiary hearing as to any of his claims, but in an abundance of caution, the Court considered as to each claim whether an evidentiary hearing was warranted or even required under the pre-AEDPA standards governing evidentiary hearings. None of petitioner's claims warrants an evidentiary hearing.

A. Ground B -- Trial Court's Failure to Suppress Statement as Involuntary

In Ground B, petitioner argues that the trial court erred in refusing to suppress as involuntary statements that petitioner made to law enforcement officers. Specifically, petitioner argues that in waiving his *Miranda* rights after first invoking those rights, petitioner's will was overborne through the use by police of psychological ploys, thereby rendering his *Miranda* waiver and subsequent statements to the police involuntary. (Petitioner's merit brief, doc.no. 100, at 44). Pointing to the Ohio Supreme Court's decision on direct appeal, respondent maintains that there is no evidence that petitioner was coerced into making a statement or into waiving his *Miranda* rights. (Merit Brief, doc.no. 101, at 10).

The question of whether petitioner's *Miranda* waiver and subsequent statement were voluntary is not a factual issue entitled to the presumption of correctness under 28 U.S.C. § 2254(d)(superseded). *See Miller v. Fenton*, 474 U.S. 104, 117 (1985). Only factual findings that the state courts made in determining, ultimately, that petitioner's waiver and statement were voluntary are presumed correct.

The facts relevant to this claim were set forth by the Supreme Court of Ohio in *State v. Van Hook*, 39 Ohio St. 3d 256, 258-59 (1988):

> On the morning of April 1, 1985, appellant was arrested by the combined forces of the Ft. Lauderdale and the Oakland Park Police Departments. While at the Oakland

Park police headquarters, he was advised of his *Miranda* rights. At that time, he acknowledged that he wished to make a statement without an attorney present, but then added: "Maybe I should have an attorney." Interpreting this statement as an invocation of the right to counsel, police ceased all interrogation and informed the Cincinnati homicide department of the arrest. Appellant was then transferred to the Broward County Sheriffs Department. No attorney was provided to appellant between the time when police ended their interrogation and the time, some hours later, when appellant confessed to the Cincinnati homicide detectives. At 9:20 p.m., the detectives arrived at the Broward County Sheriffs office, where they met with appellant. Initially, they discussed the extradition of appellant to Cincinnati. Apparently appellant had, subsequent to his post-arrest interrogation, voluntarily communicated to the Ft. Lauderdale police that he desired to waive the extradition process so as to expedite his return to Cincinnati. This had been communicated to the homicide detectives prior to their departure from Cincinnati. They sought to confirm these facts and also to inform appellant of their intention to leave for Cincinnati on the following day.

During the conversation, Detective Davis told appellant that he, Davis, had been in contact with appellant's mother and that "we had a lot to talk to him about." The

detective informed him that the detectives could not talk to him unless appellant wanted to talk to them and make a statement. Appellant replied that he also had spoken with his mother, that she had advised him to "just tell the truth," and that he wanted to make a statement. Thereafter, police explained the *Miranda* rights to him, specifically asking if he now desired an attorney, to which he replied that he did not. Appellant then signed a Notification of Rights/Waiver of Rights form. Afterwards, a recording device was turned on and the police again explained to appellant all of his *Miranda* rights, pausing after each right to inquire whether appellant understood. They informed him that he could end the session at any time, after which they also inquired as follows:

"Q. Okay. And uh do you wanna make uh statement. Is that correct?

"A. Yes

"Q. An' I understand that you were arrested today at approximately what time?

"A. 10:50 this morning.

"Q. Okay, an' as you were being booked, you were given your rights by Sgt., I believe, Perry.

"A. Yes.

"Q. Okay, an' I also understand at that time you indicated to him that you wanted to make

uh statement but that you wanted to confer with a lawyer first.

"A. Right.

"Q. Okay. But you have since changed your mind. Is that correct?

"A. Yes

"Q. Okay, an' this is being done of your own free will, correct?

"A. Yes, sir.

"Q. Okay. Nobody's used any force, no coercion of any kind against you to make a statement?

"A. No

"Q. Can you explain why you changed your mind?

"A. Uh, I talked to my Mom today an' she jus' told me, you know, be cooperative an' jus' tell the truth.

"Q. An' that's when you, you, did you say you're waivin' your rights to an attorney at this time, after talkin' to your Mom[?]

"A. Right."

State v. Van Hook, 39 Ohio St. 3d 256, 258-59 (1988). Petitioner subsequently confessed to murdering and robbing the victim. Based on these facts and relevant case law, the Ohio Supreme Court concluded that the trial court had not erred when it refused to suppress petitioner's confession "because the record demonstrates that appellant himself

reinitiated his own interrogation through a third party." *Id.* at 259. Two justices dissented. *Id.* at 265-270 (Wright, J., dissenting; joined by Brown, J.).

In his previous motion for partial summary judgment, petitioner raised a claim challenging the trial court's admission of his confession on the ground that it violated *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)(holding that once a suspect in custody invokes his right to counsel, all interrogation must cease until counsel has been made available to the suspect, unless the suspect himself initiates further communication with law enforcement officers). The Court concluded that petitioner's *Edwards* claim was without merit.

The issue presently before the Court, distinct from petitioner's *Edwards* claim, is whether petitioner's *Miranda* waiver and subsequent statements to the police were involuntary. The essence of petitioner's argument is that he initially invoked his *Miranda* rights by refusing to answer questions without an attorney, but that he subsequently waived his *Miranda* rights and gave a statement to police – not as a voluntary act on his part – but because his will was overborne through the police use of psychological ploys. According to petitioner, law enforcement officers were intent on obtaining a confession from petitioner, and, to that end, armed themselves with an arsenal of tools calculated to maximize the likelihood that petitioner would confess.

Petitioner argues that Cincinnati law enforcement officers enlisted the assistance of his mother, persuading her to provide them with

information about petitioner's whereabouts, details about petitioner's psychological problems, and cooperation in allowing her phone to be tapped, in not tipping off petitioner that he was being sought for murder, and eventually in encouraging him to cooperate with police. According to petitioner, Cincinnati law enforcement officers then enlisted the services of a psychologist, Dr. Lippert, to develop a psychological profile of petitioner to assist them in pursuing a line of questioning that would induce maximum cooperation out of petitioner. Armed with Dr. Lippert's opinion that petitioner had killed the victim as a manifestation of his rejection of his own homosexual or bisexual tendencies, police avoided mentioning during their questioning of petitioner that the murder might have been sexually motivated, and instead, steered petitioner toward robbery as his motivation for killing the victim. Finally, according to petitioner, police were aware of, but completely disregarded, the fact that petitioner had requested an attorney. Thus, petitioner argues, police undertook to question petitioner knowing full well that he already had "indicated his inability to cope with the pressures of custodial interrogation by requesting counsel . . . ." (Petitioner's merit brief, doc.no. 100, at 46, quoting *Arizona v. Roberson*, 486 U.S. 675, 686 (1988)).

Incriminating statements obtained during custodial interrogation are not admissible unless the suspect makes a valid waiver of his Fifth Amendment privilege against self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436, 460 61 (1966). A valid waiver is one that is made with full awareness of the nature of the right being relinquished and the

consequences of relinquishing the right, and is voluntary, in the sense that it was the product of a free and deliberate choice. *See, e.g., Machacek v. Hofbauer*, 213 F.3d 947, 954 (6th Cir. 2000) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)), *cert. denied*, 531 U.S. 1089 (2001). With respect to the voluntariness component, the relevant inquiry is whether the suspect's statement was obtained by physical or psychological coercion, improper inducement, or any other undue influence that overbears the suspect's will. *See Ledbetter v. Edwards*, 35 F.3d 1062, 1067 (6th Cir. 1994) (citing *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976)), *cert. denied*, 515 U.S. 1145 (1995).

> This Court has established three requirements for a finding that a confession was involuntary due to police coercion: (i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant's will; and (iii) the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statement.

United States v. Mahan, 190 F.3d 416, 422 (6th Cir. 1999) (citing *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir. 1988)). A determination of whether a waiver was voluntary is made by examining the totality of the circumstances. *Machacek*, 213 F.3d at 954; *Ledbetter*, *supra*, 35 F.3d at 1067-69. "Factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length

of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep." *Ledbetter*, *supra*, 35 F.3d at 1067, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see also Colorado v. Connelly*, 479 U.S. 157, 163 n.1 (1986) (discussing examples of police coercion sufficient to render a resulting statement involuntary).

Nothing about the actions of the Cincinnati police in this case could fairly be characterized as "objectively coercive." *Mahan*, 190 F.3d at 422. Petitioner points to law enforcement officers' enlisting of his mother's assistance, enlisting of a psychologist to develop a psychological profile that might assist officers in their efforts to question petitioner, and ignoring the fact that petitioner had previously requested an attorney. Nothing about those actions strikes this Court as "coercive." Authorities did not lie to, trick, or deceive petitioner. They did not subject to him to lengthy or prolonged questioning. They made no threats, promises, or statements about possible punishment. There is no evidence that they deprived him of sleep, food, or other physical necessities. They enlisted the assistance of petitioner's mother; there is no evidence that they compelled the assistance of petitioner's mother, or that she was anything but a willing assistant. Moreover, Detective Davis was forthcoming about the fact that he had spoken to petitioner's mother. Similarly, nothing about the preparation and use of a psychological profile of petitioner could be characterized as anything but preparedness. Finally, the Court already determined

in its *Opinion and Order* of March 28, 2002 that Cincinnati police detectives did nothing improper in approaching petitioner when they arrived in Florida, even though they were aware that petitioner had declined earlier that day to speak to the Fort Lauderdale detectives who had arrested him. (Doc.No. 109, at 3-9). In sum, nothing about the actions of the Cincinnati police in tracking down petitioner and preparing to question him even remotely rises to the level of what other courts have considered coercive. *See Frazier v. Cupp*, 394 U.S. 731, 737-39 (1969) (police officers' misrepresentation that an associate had confessed to crime did not render defendant's confession involuntary); *Ledbetter v. Edwards*, *supra*, 35 F.3d 1062 (police officers' false statements during interrogation did not render defendant's confession involuntary); *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir. 1988) (police officers' display of weapons during interrogation did not constitute coercive activity sufficient to overbear defendant's will), *cert. denied*, 490 U.S. 1020 (1989).

Even assuming that the actions of the Cincinnati police in this case could be labeled coercive, the Court is not persuaded either that the coercion was sufficient to overbear petitioner's will or that the coercion was the "crucial motivating factor in the defendant's decision to offer a statement." *Mahan*, 190 F.3d at 422. The record contains no evidence whatsoever that petitioner confessed for any reason other than that he wanted to confess. As noted above, there is no evidence that petitioner was deceived, coerced, or badgered by police. Nor is there any evidence that he was under the influence of drugs, alcohol, or even emotional distress. The

record suggests that petitioner was reasonably intelligent and, arguably, well versed in the workings of the criminal justice system. He had been in custody only twelve hours, and was not deprived of physical necessities. Petitioner was informed of his *Miranda* rights when he was taken into custody and again before he made his statement. Petitioner expressed with clarity and cogency why he desired to give a statement, after previously declining to speak with officers without an attorney present – namely, because he had spoken with his mother. There is no evidence, and no reason to infer, that petitioner's will was improperly overborne by his mother at the behest of the Cincinnati police officer who had spoken to her. All evidence and inferences suggest that a son was persuaded by his mother to come clean to authorities about crimes he had clearly committed. Petitioner's subsequent confession was thorough and articulate.

The totality of the circumstances in this case reveals on petitioner's part a voluntary waiver of his *Miranda* rights and a voluntary statement to police officers. For the foregoing reasons, the Court concludes that ground B is without merit and should be denied.

B. Ground G -- Ineffective Assistance of Trial Counsel

Petitioner argues in Ground G that he was denied effective assistance of trial counsel during the guilt-innocence phase of his capital trial. Specifically, petitioner argues that his trial attorneys were ineffective for (1) failing to obtain their own mental health expert to assist with the Not Guilty

By Reason of Insanity plea that they filed; (2) failing to request an investigator or to more thoroughly investigate the facts of the homicide; and (3) introducing the issue of petitioner's future dangerousness, which issue was irrelevant to the determination of guilt. Arguing that petitioner has failed to demonstrate either deficient performance on the part of defense counsel or resulting prejudice, respondent asserts that petitioner's allegations of trial counsel ineffectiveness in this regard are without merit.

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). With respect to the first prong of the *Strickland* test, the Court notes that, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish the second prong of the *Strickland* test, *i.e.*, prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

Inherent in counsel's responsibilities is the duty to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, *supra*, 466 U.S. at 691; *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992); *see also O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994) (failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted); *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992) (reasonable investigation was lacking, so counsel's performance was deficient). The Court will now consider each of petitioner's allegations of ineffectiveness.

1. Failure to Obtain Independent Mental Health Expert for Guilt-Innocence Phase

Petitioner argues that his trial attorneys were ineffective for failing to request the appointment of a mental health expert to assist in their defense of petitioner during the guilt-innocence phase. Petitioner points out that, once they filed a plea of Not Guilty By Reason of Insanity on April 23, 1985, defense counsel were entitled to request of the trial court funds for a mental health expert specifically to assist in petitioner's defense. Instead, according to petitioner, defense counsel relied on the three mental health experts appointed by the trial court pursuant to R.C. §2945.39, none of whom were required to speak with defense counsel, explain their reports to defense counsel, or assist defense counsel in any way. Further, petitioner argues, their evaluations were confined to petitioner's mental state at the time of the offense.

Petitioner argues that, as a result of defense counsel's failure to secure their own mental health expert, he suffered prejudicial consequences. Dr. Nancy Schmidtgoessling evaluated petitioner and testified on behalf of the prosecution. Petitioner complains that defense counsel failed to challenge her when she testified that petitioner's borderline personality disorder did not constitute a "mental disease." Similarly, when Dr. Emmett Cooper testified regarding the results of his evaluation of petitioner, neither he nor defense counsel corrected the prosecution when the prosecution continually referred to petitioner's disorder as a personality "defect." Petitioner reasons that an independent mental health expert could have assisted defense counsel in establishing, as a defense to aggravated murder, that the murder occurred – not during or in

connection with a robbery – but as a result of homophobic panic on petitioner's part. The essence of petitioner's argument is that his defense attorneys went to trial with a plea of Not Guilty by Reason of Insanity without even understanding what a "mental disease" was. As a result of defense counsel's failure to obtain their own mental health expert, according to petitioner, the three judge panel found "absolutely no evidence" that petitioner suffered from a mental disease or defect under the standards governing a plea of Not Guilty by Reason of Insanity.

Respondent argues that petitioner's attorneys were not ineffective for failing to request an independent mental health expert to assist them. According to respondent, petitioner is not entitled to countless experts, or even to one of his choosing, under *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) ("when a defendant has made preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one."). Respondent argues that there was nothing unreasonable about defense counsel's decision to rely on the court appointed experts as opposed to a "hired gun." Respondent points out that all of the court-appointed experts had sufficient time to evaluate petitioner, found petitioner to be highly cooperative, and were all well-qualified in forensic psychology.

Petitioner was indicted on April 18, 1985. Less than a week later, on April 23, 1985, petitioner's defense attorneys filed a plea of Not

Guilty by Reason of Insanity, ("NGRI"), which triggered three court-ordered psychiatric evaluations. The trial court appointed Dr. Emmett Cooper, Dr. Nancy Schmidtgoessling, and the Court Psychiatric Center to conduct evaluations of petitioner pursuant to the NGRI plea. *See* Petitioner's Appendix to the State Court Record, Vol. I, tabs 13, 14, 15, and 19.

Dr. Emmet Cooper, a psychiatrist, was called by defense counsel during petitioner's case in chief. He testified that petitioner suffered from a borderline personality disorder, and that at the time of the offense, petitioner's personality disorder, combined with his heavy consumption of alcohol and drugs, caused an acute break with reality that lasted a few minutes. Dr. Cooper went on to testify that petitioner's perception of reality was altered and that he would have had difficulty distinguishing right from wrong. Dr. Cooper also testified that petitioner appeared to have related his actions in killing the victim to a combat situation or fantasy. But Dr. Cooper could not say that petitioner suffered from a mental disease or defect.

Dr. Nancy Schmidtgoessling, a clinical psychologist, testified for the prosecution during its rebuttal case and was also called by the defense during the penalty phase of the trial. Dr. Schmidtgoessling testified that petitioner suffered from a borderline personality disorder, as well as alcohol dependence, marijuana abuse, amphetamine abuse, and a conduct disorder. She testified that petitioner may have been "psychotic" or have been in a brief transitory sort of period at the time of the

offense, insofar as he had a grossly distorted view of what was happening. She explained that petitioner was acting out a sort of combat or war hero fantasy that he had long harbored as a form of compensation, but for which he had never gotten in trouble before. She also testified that petitioner's commission of the murder may have been triggered by petitioner's own fear that he was on the verge of committing a homosexual act. She also testified, however, that petitioner never suffered from a mental disease or defect, that he was aware of the quality and wrongfulness of his actions, and that he was able to conform his conduct.

Dr. Teresito Alquizola, a physician and psychiatrist, testified for the prosecution during its rebuttal case. In addition to evaluating petitioner in connection with the aggravated murder and robbery offenses, Dr. Alquizola had evaluated petitioner two years earlier in connection with different offenses. Dr. Alquizola testified that petitioner did not suffer from a mental disease or defect, and that at the time of the offense, he possessed the capacity to know the wrongfulness of his actions and, to a large extent, was able to conform his conduct. Dr. Alquizola agreed during cross examination that petitioner's commission of the homicide may very well have been triggered by the attempted sexual act. Dr. Alquizola also testified during cross examination that petitioner may have been experiencing a momentary military fantasy.

In addition to the testimony given by Drs. Cooper, Schmidtgoessling, and Alquizola, a fourth report was prepared by Dr. Donna E. Winter of the

Court Psychiatric Center in connection with the mitigation phase of petitioner's trial, pursuant to R.C. §2947.06. Dr. Winter found that petitioner suffered from a borderline personality disorder, that petitioner was chemically dependent on drugs and alcohol, and that petitioner had concocted a long-term fantasy life in which he was a heroic military man. Dr. Winter opined that petitioner's bizarre and violent attack on the victim was brought on by a fit of rage occasioned either by petitioner's inability to find money or by homosexual panic. Dr. Winter went on to conclude that although the offense may have been a product of a fit of rage that is not uncharacteristic in a borderline personality disorder, at the time of the offense, petitioner was not suffering from a mental disease or defect, that he was able to appreciate the criminality of his actions, and that he was capable of conforming his conduct.

All four doctors reviewed numerous records, notes, and other psychological evaluations. Further, all four doctors demonstrated an understanding that petitioner had endured a chaotic and non-nurturing childhood, that his substance abuse began as early as ten years of age, that he had developed a war hero fantasy to compensate for his insecurities and conflicted feelings, and that during his military service, he had made several suicide attempts, (at least one of which appeared to have been in an attempt to avoid work assignments).

Prolonged discussion of this claim is not necessary. The Court has already considered and rejected petitioner's argument that his trial attorneys were ineffective for failing to request

appointment of an independent expert not to be neutral, but to assist in petitioner's defense. In addition to including this allegation of trial counsel ineffectiveness in the general claim of trial counsel ineffectiveness presently before the Court, *i.e.*, ground G, petitioner also raised this allegation of ineffectiveness as a free-standing claim as ground E of his amended habeas corpus petition. Petitioner moved for summary judgment on ground E. In its *Opinion and Order* of March 28, 2002, this Court rejected petitioner's claim. (*Opinion and Order*, doc.no. 109, at 15-23). After considering the parties' arguments, relevant case law, and the record, this Court concluded that it was reasonable to presume that defense counsel's decision not to seek yet another mental health expert stemmed not from neglect or laziness, but from the reasonable conclusion, based on the remarkably similar opinions of the three doctors who had examined petitioner prior to trial, that the proverbial well was dry. Having reached that conclusion after full consideration, it is not necessary for the Court to consider this allegation of trial counsel ineffectiveness anew.

2. Failure to Obtain Investigator/Failure to Investigate Facts

Petitioner argues that his trial attorneys were ineffective for failing to obtain their own investigator or for otherwise failing to conduct an appropriate investigation of the facts of the offense. Petitioner was charged with the aggravated capital murder of David Self. What elevated the offense to a capital crime essentially were the allegations that petitioner

had committed the murder in connection with robbing the victim. Petitioner argues that there was little or no evidence demonstrating that a robbery had actually occurred. Had defense counsel conducted an appropriate factual investigation, according to petitioner, defense counsel could have presented a defense at trial that petitioner committed the homicide not in connection with a robbery, but as a result of homophobic panic on petitioner's part. That, petitioner argues, would have constituted a viable defense against the charge of *aggravated* murder.

Respondent argues that there was nothing unreasonable or prejudicial about the failure of defense counsel to investigate or pursue the "homophobic panic" defense at trial. Put simply, respondent argues that a defense that petitioner's commission of the homicide was a manifestation of homophobic panic on his part would have been legally dubious and factually unsupportable. Thus, respondent reasons, defense counsel did not need an investigator to rule out such a defense.

As noted earlier, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, *supra*, 466 U.S. at 691; *see also Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001), *cert. denied*, 535 U.S. 975 (2002). Counsel is ineffective within the meaning of *Strickland* where it appears that counsel failed to investigate or prepare, failed to present any defense theory, or failed to subject state's case to any meaningful adversarial challenge. *See Kimmelman*

v. Morrison, 477 U.S. 365, 385 (1986) ("complete lack of pretrial preparation); *Rickman v. Bell*, 131 F.3d 1150, 1157 (6th Cir. 1997) (counsel totally failed to actively advocate for client where preparation consisted solely of sixteen hours of interviewing client), *cert. denied*, 523 U.S. 1133 (1998); *Groseclose v. Bell*, 130 F.3d 1161, 1169-70 (6th Cir. 1997) (counsel had no defense theory to speak of and failed to present any meaningful adversarial challenge), *cert. denied*, 523 U.S. 1132 (1998). Because attorneys enjoy a heavy presumption of competence under *Strickland*, a claim of ineffective assistance of counsel for the failure to introduce certain evidence fails where the petitioner cannot demonstrate that the omission was attributable to counsel's failure to investigate. *See Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 2608 (2003); *Campbell v. Coyle, supra*, 260 F.3d at 553. It bears reminding that the Sixth Amendment entitles criminal defendants not to perfect representation, only effective representation. *Cf. Mason v. Mitchell*, 320 F.3d 604, 618 (6th Cir. 2003) (totality of circumstances did not demonstrate that counsel were unprepared where counsel filed numerous pretrial motions, argued several pretrial hearings, and clearly articulated defense theory to jury).

Petitioner has failed to demonstrate that his trial attorneys abdicated their duty to investigate the facts. Specifically, petitioner has not alleged, and it is not apparent to the Court, what sort of factual investigation on the part of defense counsel would have led them to conclude that petitioner had not robbed, or at least attempted to rob the victim that night. The record contained evidence demonstrating

not only that a robbery and/or attempted robbery had occurred, but also that robbery was petitioner's motive in luring and eventually assaulting the victim – the most telling of which were petitioner's own statements to the police, the doctors, and his own attorneys. Petitioner explained during his statement to police that he had gone to the Subway Bar that night for the purpose of luring and robbing a homosexual. Dr. Schmidtgoessling testified, based on her evaluation of petitioner, that he had a history of "rolling" homosexuals in this manner. (Tr. Vol. II, at 393-94,400). Petitioner also admitted in his statement to police that, after murdering the victim, he looked for, but was unable to find, money on the body. Petitioner said that he stole a couple of gold chains out of a jewelry box in the victim's bedroom, as well as a leather coat. Thus, to the extent that defense counsel failed to argue or exhibited a lack of zeal in arguing that robbery was *not* petitioner's motive that night, defense counsel's actions cannot be deemed unreasonable.

It is evident from the record that defense counsel were familiar with the possibility that petitioner had been experiencing conflicted feelings or panic about his homosexual tendencies in general and his homosexual actions that night. Dr. Emmett Cooper testified during the defense's case about petitioner's conflicted lifestyle. (Tr. Vol. II, at 334, 335, 338-9), and defense counsel cross examined the prosecution's mental health expert, Dr. Nancy Schmidtgoessling, about the issue in even more detail. (Tr. Vol. II, at 414-18). Further, it is evident from the record that defense counsel considered the physical evidence regarding robbery to be weak; they

argued as much during their Rule 29 motion to dismiss the charges against petitioner at the conclusion of the prosecution's case. (Tr. Vol. II, at 324). Thus, petitioner will not be heard to argue that his defense attorneys were wholly unaware, due to their failure to investigate, of the theory that homosexual panic, as opposed to robbery, motivated petitioner to murder the victim that night. That argument is simply not supported by the record.

The most that petitioner has alleged, much less demonstrated, is that his trial attorneys could have done more, which will almost always be the case. *Mason v. Mitchell*, *supra*, 320 F.3d at 618 ("Although attorneys can always do more in preparation for a trial, we cannot conclude that Mason's attorneys did not prepare enough."). Petitioner has not demonstrated that his trial attorneys abandoned or even neglected their duty to investigate. A review of defense counsel's cross-examination of the state's witnesses and the arguments that counsel made demonstrates that defense counsel were well-versed in the facts of this case. Thus, the record does not support petitioner's allegation that his defense attorneys either failed to conduct an adequate factual investigation or performed unreasonably in failing to request their own investigator. Accordingly, the Court concludes that this component of petitioner's trial counsel ineffectiveness claim is without merit.

3. Error in Introducing Petitioner's Future Dangerousness during Guilt-Innocence Phase

Finally, petitioner argues that his trial attorneys were ineffective for raising the issue of

petitioner's future dangerousness since, according to petitioner, that information was prejudicial and not at all relevant to the guilt-innocence determination. Petitioner's argument concerns certain questions defense counsel posed to Dr. Teresito Alquizola, a witness called by the prosecution in its rebuttal case. In an apparent effort to impeach Dr. Alquizola, defense counsel asked him whether he would agree at that time with the conclusion he had reached several years earlier that Petitioner Van Hook did not exhibit a tendency for future dangerousness, except perhaps towards himself. (Tr. Vol. III, at 487). Dr. Alquizola answered in the negative, but defended his earlier conclusion on the ground that it was accurate based on the information he had had available to him at that time. *Id.* at 487-88. Petitioner argues herein that his trial attorneys were ineffective for essentially raising the issue of his future dangerousness, when that issue was not relevant to the guilt-innocence determination.

Respondent argues that petitioner's allegation of trial counsel ineffectiveness in this regard is without merit. Respondent points out that the state courts rejected this argument, due in large part to the fact that the case was tried to a three-judge panel instead of a jury. Respondent reasons that defense counsel merely made the statement at issue to impeach a state witness, and that the statement had no impact on the verdict, in light of the context in which it was made. Finally, respondent argues that petitioner can demonstrate neither deficient performance on the part of his attorneys, nor prejudice, because of the overwhelming evidence of his guilt. Respondent's arguments are well taken.

To find that petitioner's trial attorneys were ineffective, the Court would have to find that they performed unreasonably and that petitioner was prejudiced by their deficient performance. The Court can find neither. Petitioner's attorneys clearly were attempting to impeach the credibility or expertise of the state's rebuttal witness, a decision that falls squarely within the realm of reasonable trial strategy, especially when the distorting effects of hindsight are eliminated. If the statements that defense counsel made in this regard were questionable, in light of the fact that they emphasized petitioner's future dangerousness and were of marginal value in actually impeaching the credibility or expertise of Dr. Alquizola, they were equally benign in their prejudicial effect. For one thing, they were isolated and fleeting. Moreover, as respondent points out and the state courts emphasized, petitioner was tried before a three-judge panel. It is reasonable to presume that a trial panel, as opposed to a jury, will be scrupulous enough to avoid admitting or considering improper evidence in its guilt-innocence determination. In *State v. White*, 15 Ohio St. 2d 146, 151 (1968), the Ohio Supreme Court noted that it would indulge "in the usual presumption that in a bench trial in a criminal case the [trial] court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." Federal circuits indulge the same presumption. *United States v. Busch*, 758 F.2d 1394, 1398 (10th Cir. 1985); *United States v. Impson*, 562 F.2d 970, 971 (5th Cir. 1977), *cert. denied*, 434 U.S. 1050 (1978); *United States ex rel. Placek v. Illinois*,

546 F.2d 1298, 1304-1305 (7th Cir. 1976). In short, there is no indication from the record that the statements at issue influenced or had any effect at all on the verdict reached by the three-judge panel. That being so, the Court is not persuaded either that defense counsel performed unreasonably in eliciting the statements about petitioner's future dangerousness, or that petitioner was prejudiced by the statements.

For the foregoing reasons, the Court concludes that the claims of ineffective assistance of trial counsel set forth in ground G are without merit and must be denied.

C. Ground H -- State's Use of an Informant

Ground H alleges that the state's use of an informant violated petitioner's rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments. In his merit brief, petitioner expressly abandons this claim. Accordingly, Ground H will be denied.

D. Ground O -- Constitutionality of Ohio's Death Penalty Statutes

In Ground O, petitioner raises several challenges to the constitutionality of Ohio's death penalty statutes. The various constitutional challenges raised by petitioner may be summarized as follows:

- The uncontrolled discretion enjoyed by prosecutors in the decision of whether to seek a capital indictment renders Ohio's death penalty arbitrary and capricious.

- Racism is a factor in the imposition of the death penalty in Ohio, insofar as black males represent only five per cent of Ohio's general population, but represent fifty per cent of Ohio's death row population.
- Ohio has systematic constitutional problems in the administration of the death penalty, including the under-funding of attorneys, the lack of a fair and adequate appellate review process, and the pervasive effects of racism.
- Ohio's scheme requiring proof of aggravating circumstances during the guilt-innocence phase of the trial thwarts the constitutional requirement of individualized determination of appropriateness.
- Ohio's scheme is unconstitutional for requiring the pre-sentence report and mental evaluation, once requested by petitioner, to be submitted to the jury or judge.
- Ohio's system of proportionality review is flawed because courts review only those cases in which the death sentence was imposed.
- Ohio's appellate courts are not following the appropriateness analysis set forth in R.C. §2929.05(A), allowing the reviewing court to affirm a death sentence only if it determines that the aggravating circumstances outweigh the mitigating

factors and that death is the appropriate sentence.

Citing *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001), and *Scott v. Mitchell*, 209 F.3d 854, 884-85 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000), respondent argues that petitioner's various constitutional challenges are foreclosed by law, having been considered and rejected by the Sixth Circuit. Curiously, petitioner offers no argument in response.

As respondent suggests, nearly all of the constitutional challenges raised or alluded to by petitioner are foreclosed by Sixth Circuit precedent. To the extent that petitioner suggests that Ohio's death penalty scheme is "mandatory" in nature, the Sixth Circuit squarely rejected that argument in *Coleman v. Mitchell*, 268 F.3d 417, 442 (6th Cir. 2001) ("the Ohio scheme does not mandate the death penalty for any particular crime...."), *cert. denied sub nom., Coleman v. Bagley*, 535 U.S. 1031 (2002). With respect to petitioner's argument that uncontrolled discretion exercised by prosecutors in the capital indictment process creates an impermissible risk of arbitrary infliction of the death penalty, the Sixth Circuit has said, "these 'discretionary stages' do not implicate the concerns [about arbitrariness, capriciousness, and discrimination] expressed in *Furman v. Georgia*, 408 U.S. 238 (1972)." *Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003); *see also Coleman*, *supra*, 208 F.3d at 442.

The Sixth Circuit has also rejected arguments, like petitioner's herein, alleging that Ohio's death penalty is imposed in a racially discriminatory

manner. In support of his argument that race plays a role in the imposition of the death penalty in Ohio, petitioner points out that, although black males make up only five per cent of Ohio's general population, black males make up fifty per cent of Ohio's death row population. The Sixth Circuit has rejected such arguments.

> [A]ny statistically-based argument, like Petitioner's, concerning racial disparities in the application of the death penalty must confront *McCleskey v. Kemp*, 481 U.S. 279 (1987).
>
> * * *
>
> Although the racial imbalance in the State of Ohio's capital sentencing scheme is glaringly extreme, it is no more so that the statistical disparities considered and rejected by the Supreme Court in *McCleskey* as insufficient to 'demonstrate a constitutionally significant risk of racial bias affecting the ... capital sentencing process.'" (citation omitted).

Coleman v. Mitchell, supra, 268 F.3d at 441-42.

Petitioner's argument that requiring proof of the aggravating circumstances during the guilt-innocence phase of a capital trial prevents a genuine narrowing of those offenders for whom death is the appropriate sentence has been rejected by the Sixth Circuit in accordance with Supreme Court precedent. In *Lowenfeld v. Phelps*, 484 U.S. 231, 244-45 (1988), the Supreme Court held that the use of aggravating circumstances is simply a means by which to narrow the class of offenders deserving of the death penalty,

and that there is no reason why that narrowing function cannot occur during the guilt-innocence phase. The Sixth Circuit has concluded that "the Ohio requirement that aggravating circumstances be proven at the guilt, rather than penalty, phase of the trial is consistent with *Lowenfeld*." *Coleman*, *supra*, 268 F.3d at 443.

Petitioner's argument that Ohio's scheme of proportionality review is flawed has squarely been rejected by the Sixth Circuit. "Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison." *Buell v. Mitchell*, 274 F.3d 337, 369 (6th Cir. 2001); *see also Wickline v. Mitchell*, *supra*, 319 F.3d at 824-25; *Greer v. Mitchell*, 264 F.3d 663, 691 (6th Cir. 2001), *cert. denied*, 535 U.S. 940 (2002). With respect to petitioner's argument that Ohio's appellate courts have failed to comply with the appropriateness review required by R.C. §2929.05(A), the Court notes that, beyond a passing assertion that the appropriateness review conducted by the state appellate courts is too cursory, (Petitioner's Merit Brief, doc.no. 100, at 103), petitioner fails to explain or demonstrate how the state appellate courts have failed to comply with R.C. §2929.05(A)'s appropriateness review or why the provisions of R.C. §2929.05(A) are constitutionally infirm. Thus, petitioner's assertion must fail. In any event, the Sixth Circuit has cited the appropriateness review set forth in R.C. §2929.05(A) with approval. *See Buell v. Mitchell*, *supra*, 274 F.3d at 368-69.

Petitioner's argument that Ohio's capital punishment scheme is unconstitutional because, under R.C. §2929.03(D)(1), any presentence investigation report or mental examination requested by petitioner must be submitted to the jury or the trial court, if the case is being tried to a three-judge panel, has been rejected by the Sixth Circuit. In *Cooey v. Coyle*, 289 F.3d 882, 925-26 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1620 (2003), the Sixth Circuit described the petitioner's challenge against Ohio's rule requiring mandatory submission of presentence reports and mental evaluations as "utterly implausible," and went on to conclude that, "we could find no case where the Constitution has been construed as forbidding such a rule."

The remainder of petitioner's constitutional challenges, although not squarely considered and rejected by the Sixth Circuit, are nonetheless without merit. The Court rejects petitioner's assertion that Ohio has systematic constitutional problems in the administration of capital punishment, *i.e.*, under-funding of counsel, lack of fair and adequate appellate review, and pervasive effects of racism. Petitioner's argument that the administration of Ohio's capital punishment system is constitutionally infirm because of the under-funding of counsel does not state a constitutional claim. The Constitution entitles criminal defendants to effective assistance of counsel, and the test for determining whether that right has been violated remains the two-part test set forth in *Strickland v. Washington*, *supra*. As noted above, petitioner's various arguments challenging the fairness or adequacy of the appellate review process in Ohio's

capital punishment system are precluded by Sixth Circuit precedent. *See, e.g., Wickline v. Mitchell*, 319 F.3d 813; *Buell v. Mitchell*, 274 F.3d 337; *Greer v. Mitchell*, 264 F.3d 663. Finally, the Court has also determined that petitioner's complaint about the pervasive effects of racism in Ohio's capital punishment scheme fails under controlling Supreme Court and Sixth Circuit precedent. *Coleman v. Mitchell, supra*, 268 F.3d at 441-42 (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

In conclusion, petitioner asserts in summary fashion that Ohio's capital punishment system is arbitrary and discriminatory. That blanket assertion has been rejected by the Sixth Circuit. *Buell, supra*, 274 F.3d at 367-68. Further, this Court has considered and rejected petitioner's various constitutional challenges. That being so, the constitutional claims set forth in Ground O are without merit and will be denied.

E. Ground Q – Summary Dismissal of Capital Postconviction Actions in Hamilton County

In Ground Q, petitioner assails the adequacy of Ohio's postconviction review process as it is employed in Hamilton County. Among petitioner's complaints is the fact that postconviction litigants in Ohio are not entitled to subpoena powers or discovery as a matter of course, and that capital postconviction litigants in Hamilton County are never granted these privileges. Petitioner further complains that postconviction litigants in Hamilton County are never afforded evidentiary hearings. These barriers to factual development are exacerbated, according to petitioner, because trial

courts in Hamilton County routinely adopt *in toto* proposed findings of fact and conclusions of law submitted by the prosecution, without affording petitioners the opportunity to respond or submit proposed findings of their own. Petitioner goes on to argue that capital postconviction actions originating in Hamilton County do not receive meaningful appellate review, in part because the appellate court refuses to suspend the rules imposing page limits on appellate briefs. Finally, petitioner argues that, with the advent of procedures and doctrines such as *res judicata*, *see State v. Perry*, 10 Ohio St. 2d 175 (1967), Ohio's postconviction scheme has essentially been rendered futile.

Respondent presents three arguments against petitioner's claim. First, respondent argues that petitioner's claim is procedurally barred. Respondent argues in the alternative that claims challenging postconviction procedures are not cognizable in federal habeas corpus. Finally, respondent argues that none of petitioner's various challenges warrant relief.

Most of respondent's arguments are well taken. Initially, the Court notes that respondent's assertion that petitioner's claim was found by this Court to be procedurally defaulted is incorrect. This Court made no such finding. (*Opinion and Order*, 01/19/01, doc.no. 94).

As a general rule, allegations concerning collateral or postconviction review are not cognizable in federal habeas corpus. Habeas corpus exists, after all, as a means for challenging the constitutionality of a prisoner's confinement; alleged malfeasance

during collateral proceedings bears no relationship whatsoever on the legality of a prisoner's confinement. The Sixth Circuit has held that alleged errors or deficiencies in state collateral proceedings cannot provide the basis for habeas corpus relief. *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1987); *see also Greer v. Mitchell*, *supra*, 264 F.3d at 681. Petitioner has not demonstrated, and it does not otherwise appear, that the Constitution requires states to afford postconviction review. *See*, *e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551 (1987);[2] *see also Greer*, *supra*. To be entitled to habeas corpus relief, a petitioner must demonstrate that he is being confined in violation of the Constitution of the United States. *See* 28 U.S.C. §2254(a). This claim does not allege that petitioner's confinement is illegal. Thus, petitioner's various challenges to the adequacy of Ohio's postconviction procedures simply

---

[2] In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court held that state prisoners are not constitutionally entitled to counsel in connection with postconviction proceedings. In so holding, the Court explained:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. (citation omitted). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. ***States have no obligation to provide this avenue of relief.*** *cf. United States v. MacCollum*, 426 U.S. 317, 323 (1976) (plurality), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well. (emphasis added).

Finley, 481 U.S. at 556-57.

do not warrant habeas corpus relief. Ground Q will be denied.

III. Conclusion

For the foregoing reasons, all of petitioner's grounds are **DENIED** and this action is **DISMISSED**. The clerk shall enter a final judgment in this case denying all of petitioner's claims and dismissing this action in its entirety with prejudice.

s/ GEORGE C. SMITH
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-1-94-269
Judge Smith
Magistrate Judge Abel
Filed: March 28, 2002

ROBERT VAN HOOK,

Petitioner,

v.

CARL ANDERSON, Warden,

Respondent.

OPINION AND ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. §2254. This matter is before the Court upon petitioner's motion for partial summary judgment, (doc.no. 103), respondent's memorandum in opposition, petitioner's reply in support, and the parties' merits briefs.

I. Introduction

Petitioner asserts that he is entitled to judgment as a matter of law on five issues. Specifically, he seeks judgment on his claims that his confession was admitted in violation of *Edwards v. Arizona*, 451 U.S. 477 (1980), that the prosecution suppressed material, exculpatory evidence, that

defense counsel were ineffective for failing to request an independent mental health expert to assist in petitioner's defense, that defense counsel were ineffective in connection with the penalty phase of petitioner's case, and that appellate counsel were ineffective during petitioner's first appeal as of right for failing to raise two meritorious issues. Respondent submits that petitioner's motion for partial summary judgment should be overruled or that summary judgment should be granted against petitioner on each of these issues.

II. Discussion

A moving party is entitled to judgment as a matter of law, pursuant to Fed. R. Civ. P. 56(c), if the pleadings, documents obtained pursuant to discovery, exhibits, and state court record demonstrate that there is no genuine issue as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). When deciding a motion for summary judgment, the reviewing court must construe the evidence and all inferences to be drawn from the evidence in a light most favorable to the non-moving party. *Id.* at 255. It is the moving party who bears the initial burden of demonstrating that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). A dispute of fact is "genuine" within the context of a motion for summary judgment only if "the evidence is such that reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 252. The non-moving party, in order to show that summary judgment is not appropriate,

may not rely on conclusory allegations, but must point to affirmative evidence supporting the non-moving party's position. *Celotex*, 477 U.S. at 324.

Although this is not the usual civil case, it is well settled that the motion for summary judgment provided for in Rule 56(c) is applicable to habeas corpus proceedings. *See, e.g., Blackledge v. Allison*, 43 1 U.S. 63, 80-81 (1977). Thus, petitioner's motion for summary judgment is governed not only by the standards governing summary judgment motions, but also by the principles, rules, and substantive case law governing the area of habeas corpus. This means, among other things, that factual determinations made by the state courts enjoy a presumption of correctness, so long as they are fairly supported by the record, 28 U.S.C. §2254(d),[1] and that what constitutes a "material" fact is informed by the substantive law governing disposition of the issue. *See Anderson*, 477 U.S. at 248. With these principles in mind, the Court will consider each of the issues on which petitioner seeks judgment as a matter of law.

1. Ground A - Trial Court Erred In Not Suppressing Statement to Cincinnati Police

In Ground A, petitioner argues that the trial court erred in not suppressing the statement petitioner made to Cincinnati police while he was being held in a county jail in Florida. Petitioner

---

[1] Petitioner's habeas corpus action was filed prior to April 24, 1996, so his action is governed by habeas corpus law as it existed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996.

argues that, after he clearly indicated to Florida law enforcement officers that he was invoking his right to counsel, Cincinnati law enforcement officers subsequently initiated contact with him, after which he gave a tape-recorded confession. Respondent argues that the state courts were correct in determining that petitioner himself had reinitiated contact with law enforcement officers, and thereafter knowingly and voluntarily waived his previously invoked right to counsel. In moving for summary judgment on this issue, petitioner argues that he is entitled to relief as a matter of law because the factual finding that he reinitiated contact with law enforcement officers is completely unsupported by the record.

In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the United States Supreme Court held that once a suspect in custody invokes his right to counsel, all interrogation must cease until counsel has been made available to the suspect, unless the suspect himself initiates further communication with law enforcement officers. According to subsequent cases, *Edwards* was intended to establish a bright-line rule to prevent a suspect in custody from being badgered into waiving a previously invoked right to counsel. *See, e.g., Smith v. Illinois*, 469 U.S. 91, 98-99 (1984); *United States v. Whaley*, 13 F.3d 963, 966 (6th Cir. 1994). When a suspect who invoked his right to counsel alleges a violation of *Edwards*, the court must determine first, whether the suspect reinitiated discussions with police, and, if so, whether his subsequent waiver of counsel was a knowing and voluntary act. *Edwards*, 451 U.S. at 486. The Court of Appeals for the Sixth Circuit has

held that "an *Edwards* initiation occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case." *Whaley*, 13 F.3d at 967 (citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983)). The determination of whether an *Edwards* initiation has occurred, according to the Sixth Circuit, is a legal question. *Whaley*, 13 F.3d at 968.

The Supreme Court of Ohio set forth the relevant facts surrounding petitioner's *Edwards* claim:

> On the morning of April 1, 1985, appellant was arrested by the combined forces of the Ft. Lauderdale and the Oakland Park Police Departments. While at the Oakland Park police headquarters, he was advised of his *Miranda* rights. At that time, he acknowledged that he wished to make a statement without an attorney present, but then added: "Maybe I should have an attorney." Interpreting this statement as an invocation of the right to counsel, police ceased all interrogation and informed the Cincinnati homicide department of the arrest. Appellant was then transferred to the Broward County Sheriffs Department. No attorney was provided to appellant between the time when police ended their interrogation and the time, some hours later, when appellant confessed to the Cincinnati homicide detectives.
>
> At 9:20 p.m., the detectives arrived at the Broward County Sheriffs office, where they met with appellant. Initially, they

discussed the extradition of appellant to Cincinnati. Apparently appellant had, subsequent to his post-arrest interrogation, voluntarily communicated to the Ft. Lauderdale police that he desired to waive the extradition process so as to expedite his return to Cincinnati. This had been communicated to the homicide detectives prior to their departure from Cincinnati. They sought to confirm these facts and also to inform appellant of their intention to leave for Cincinnati on the following day.

During the conversation, Detective Davis told appellant that he, Davis, had been in contact with appellant's mother and that "we had a lot to talk to him about." The detective informed him that the detectives could not talk to him unless appellant wanted to talk to them and make a statement. Appellant replied that he also had spoken with his mother, that she had advised him to "just tell the truth," and that he wanted to make a statement. Thereafter, police explained the *Miranda* rights to him, specifically asking if he now desired an attorney, to which he replied that he did not. Appellant then signed a Notification of Rights/Waiver of Rights form. Afterwards, a recording device was turned on and the police again explained to appellant all of his *Miranda* rights, pausing after each right to inquire whether appellant understood. They informed him that he could end the session at any time, after which they also inquired as follows:

"Q. Okay. And uh do you wanna make uh statement. Is that correct?

"A. Yes

"Q. An' I understand that you were arrested today at approximately what time?

"A. 10:50 this morning.

"Q. Okay, an' as you were being booked, you were given your rights by Sgt., I believe, Perry.

"A. Yes.

"Q. Okay, an' I also understand at that time you indicated to him that you wanted to make uh statement but that you wanted to confer with a lawyer first.

"A. Right.

"Q. Okay. But you have since changed your mind. Is that correct?

"A. Yes

"Q. Okay, an' this is being done of your own free will, correct?

"A. Yes, sir.

"Q. Okay. Nobody's used any force, no coercion of any kind against you to make a statement?

"A. No

"Q. Can you explain why you changed your mind?

"A. Uh, I talked to my Mom today an' she jus' told me, you know, be cooperative an' jus' tell the truth.

"Q. An' that's when you, you, did you say you're waivin' your rights to an attorney at this time, after talkin' to your Mom[?]

"A. Right."

State v. Van Hook, 39 Ohio St. 3d 256, 258-59 (1988). Petitioner subsequently confessed to murdering and robbing the victim. Based on these facts and relevant case law, the Ohio Supreme Court concluded that the trial court had not erred when it refused to suppress petitioner's confession "because the record demonstrates that appellant himself reinitiated his own interrogation through a third party." *Id.* at 259. Two justices dissented. *Id.* at 265-270 (Wright, J., dissenting).

Petitioner argues that the trial court erred in not suppressing his confession. In moving for summary judgment on this issue, petitioner argues that the only issue before this Court is whether he personally reinitiated contact with law enforcement after invoking his right to counsel under *Edwards*. Petitioner insists that the finding that he evinced a willingness to speak to police is completely unsupported by the record and contrary to law. Petitioner points out that he made no contact with Detective Davis or anyone else from the Cincinnati police department indicating that he wanted to discuss his case. Petitioner disputes the determination that he somehow reinitiated discussions with the police through his mother,

arguing that there is no authority supporting the notion that anyone but the *suspect himself* may initiate further discussions with police after that suspect has invoked his right to counsel. Petitioner maintains that the bright line rule established in *Edwards* was clearly violated in his case.

Respondent argues that the record amply demonstrates both that petitioner evinced a willingness and a desire, through his mother, for a generalized discussion about the investigation, and that following his initiation of further discussions, petitioner knowingly and voluntarily waived his right to counsel. Respondent insists that petitioner can point to no facts in the record demonstrating either that the police urged petitioner's mother to advise him to confess, or that police repeatedly sought to question petitioner after he initially invoked his right to counsel. In fact, according to respondent, the record amply demonstrates that petitioner made his decision to waive his right to counsel and speak to police before the Cincinnati detectives ever spoke to him and independent from any words or actions on the part of the detectives.

Upon a careful review of the record, relevant case law, and the parties' arguments, the Court concludes that the record adequately demonstrates that petitioner evinced a willingness and a desire for further discussions with police, and that his subsequent waiver of his right to counsel was a knowing and voluntary act on his part. Based on the facts, there is no question that petitioner invoked his right to counsel, that the Cincinnati police knew he had invoked his right to counsel, and that at no time

prior to speaking with the Cincinnati police was petitioner furnished with counsel. Thus, any statements petitioner made thereafter were admissible only if petitioner initiated further discussions with police. In the Court's view, the facts set forth in the record, and construed in respondent's favor, demonstrate that petitioner initiated the discussions with police that led to his confession.

Before Cincinnati Detectives Davis and Rowland arrived at the Broward County Jail, they had received no contact from petitioner, and no information from any Florida law enforcement officers, indicating that petitioner wanted to speak to them. (Supp. Hrng. Tr., at 11-12, 17). At some point prior to arriving in Ft. Lauderdale, however, Detective Davis had spoken to petitioner's mother. (*Id.*, at 21). After arranging for petitioner to be brought to an interview room, Detective Davis introduced himself and Detective Rowland, confirmed their understanding that petitioner had voluntarily waived extradition, and explained that they would be taking petitioner back to Cincinnati the following day. After that, Detective Davis indicated that he had spoken to petitioner's mother, that they had a lot to talk about, but that they could not talk to petitioner unless petitioner wanted to talk to them. Petitioner confirmed that he had spoken to his mother and that he wanted to talk to them. Although Detective Davis had not received contact from petitioner, Detective Davis definitely believed, as a result of speaking with petitioner's mother, that petitioner wanted to speak to him. (*Id.*, Tr., at 21-22). That is, Detective Davis's discussions with petitioner, (beyond the benign explanation that

petitioner would be taken to Cincinnati the following day, which hardly constitutes interrogation), were provoked by petitioner's indication, through his mother, that he wanted to speak to Detective Davis.

The Court's conclusion is consistent with the letter and spirit of *Edwards*. *Edwards* and its progeny cases reflect that *Edwards*' bright line rule was established to protect a suspect in custody from being badgered or enticed into waiving his previously invoked right to counsel. *See Smith v. Illinois*, *supra*, 469 U.S. at 98-99; *Minnick v. Mississippi*, 498 U.S. 146, 151-54 (1990); *United States v. Whaley*, *supra*, 13 F.3d at 966. The facts in this case, far from suggesting any such police overreaching, actually demonstrate that petitioner's decision to make a statement to the police was made as a result of petitioner's conversation with his mother and before Cincinnati police ever spoke to him. Petitioner insists that no one but a suspect himself can initiate further discussions with police in the context of *Edwards*, but petitioner has not cited, and the Court is not aware of, any authority holding that a suspect may not initiate further discussions with police through a third party. Under *Edwards* and its progeny cases, this Court understands the relevant inquiry to be whether the suspect did evince a willingness and a desire for further discussions with the police, however the suspect managed to do so. In sum, the facts demonstrate that Detective Davis spoke to petitioner because there were routine matters about petitioner's extradition that Detective Davis sought to explain and because petitioner had evinced a willingness and a desire, through his

mother, to speak to Detective Davis about the investigation.

For the foregoing reasons, petitioner's motion for summary judgment on Ground A is DENIED.

2. Grounds D and F - Material, Exculpatory Evidence Was Withheld

Petitioner argues in Grounds D and F that the state suppressed relevant, material, exculpatory evidence. Petitioner contends that the trial court failed to disclose to defense counsel the existence of a treatment addendum submitted by Dr. Schmidtgoessling at the close of petitioner's trial stating that petitioner may have committed the offenses as a result of homosexual panic, and that the prosecution failed to disclose a psychological profile that had been prepared by an expert retained by the prosecution, (Dr. Lippert), also indicating that petitioner may have committed the offenses as a result of homophobic panic. Petitioner contends the withheld evidence would have assisted defense counsel during the guilt phase in persuading the trier of fact that because petitioner lacked the specific intent to purposely cause the death of the victim or to commit robbery, petitioner should have been convicted of lesser included offenses such as murder or manslaughter. Petitioner further contends that the withheld evidence would have assisted defense counsel during the penalty phase in establishing that petitioner had a mental disability, and in negating the State's argument that the offenses were calculated and that petitioner was angry about the failed robbery. Respondent argues that the evidence in question was not material

because the two documents do not create a reasonable probability, as opposed to mere possibility, of a different result. In moving for summary judgment, petitioner contends that the withheld evidence, in the context of the whole record, was material.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." According to *Brady* and its progeny, "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (citations omitted). In a series of progeny cases, the Supreme Court has since held that the prosecution's duty to disclose exists regardless of whether the defendant requests the disclosure of such evidence and regardless of whether the evidence is in the possession of the prosecutors or other law enforcement agencies. *Strickler*, *supra*, 527 U.S. at 280-81. Thus, there are three essential elements to a *Brady* violation: (1) the evidence in question must be favorable, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed; and (3) prejudice must have ensued.

For purposes of this discussion, the Court will assume without deciding that petitioner has satisfied the first two elements, namely, that the evidence in question was favorable because it tended to negate

the element of specific intent not only as to the aggravated murder and robbery offenses, but also as to the death penalty specification, and that the evidence in question was withheld. The issue[2] before the Court, therefore, is whether petitioner can establish the prejudice necessary to satisfy the "materiality" component. *Strickler*, *supra*, 527 U.S. at 282.

In *Strickler*, the Supreme Court addressed the prejudice component of a *Brady* violation in considerable detail. The Court emphasized that, "'The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Strickler*, *supra*, 527 U.S. at 289-290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). The Court went on to clarify that determining whether evidence is material is not just a matter of determining whether, after considering the undisclosed evidence, the remaining evidence is

---

[2] It bears reminding that in its *Opinion and Order* of January 19, 2001, the Court concluded that the *Brady* claim at issue was subject to procedural default. Petitioner asserts as cause the state's suppression of the evidence in question. Since the Court assumes, for purposes of this discussion that the evidence was suppressed and that the evidence was favorable, petitioner can demonstrate the prejudice prong of the cause-and-prejudice test only if he can establish the prejudice necessary to satisfy the materiality component of his *Brady* claim. *Strickler*, *supra*, 527 U.S. at 282. That is, the determination of whether petitioner can demonstrate cause and prejudice overlaps with the determination of whether petitioner can establish the three essential elements of a *Brady* violation.

still sufficient to support the conviction or sentence. *Strickler*, *supra*, 527 U.S. at 290. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* (quoting *Kyles*, *supra*, 5 14 U.S. at 435). The Court also emphasized that petitioner must establish a reasonable ***probability***, not just a reasonable possibility. *Strickler*, *supra*, 527 U.S. at 291-92.

Based on the evidence and relevant case law, the Court concludes that the treatment addendum and Dr. Lippert's psychological profile of defendant do not create a reasonable probability that petitioner's conviction or sentence would have been different had the materials been disclosed. Dr. Schmidtgoessling was appointed by the trial court to evaluate petitioner prior to trial pursuant to petitioner's not guilty by reason of insanity plea. She testified on behalf of the State, in rebuttal, during the guilt phase of the trial. On the day that presentation of evidence in the guilt phase of the trial concluded, Dr. Schmidtgoessling submitted a treatment addendum to the presiding judge, stating simply:

> Two hypothesis are likely and cannot be preferred one over the other because Mr. Van Hook gives different stories of the sequence of events. Based on the police confession it seems Mr. Van Hook assaulted the victim, David Self, in rage after he found no money in the apartment. The second hypothesis – based

> on Mr. Van Hook's story to us – was that he assaulted Mr. Self in a homosexual panic.

(Appendix to Petitioner's Motion for Partial Summary Judgment, Vol. III, Exh. 3). Petitioner also refers in his petition to a psychological profile of petitioner prepared by a mental health expert at the behest of the prosecution that contained similar references to the possibility that petitioner committed the offenses during a homophobic panic. This evidence, viewed in the context of the entire record, does not create a reasonable probability that petitioner's conviction or sentence would have been different had the materials been disclosed because that evidence was not strong enough to negate or undermine the other evidence demonstrating the existence of specific intent on petitioner's part. Further, the record actually contained evidence suggesting that petitioner might have committed the offenses, in part, due to his conflicted feelings about the homosexual act in which he nearly participated.

The treatment addendum and psychological profile simply are not substantial enough to cast doubt on the evidence that was presented. For one thing, the evidence cannot fairly be characterized as strong. Dr. Schmidtgoessling stated in her addendum that the possibility that petitioner committed the assault during homosexual panic could not be preferred over the possibility that petitioner committed the assault in a rage after he found no money in the victim's apartment. The theory that petitioner "snapped" and committed the assault during a homophobic rage, even if believed, does not undermine the other multiple indicia that

he intended to rob and kill the victim, and escape detection. Petitioner stated during his confession and subsequently during each mental evaluation that his intent that day was to lure a homosexual for the purposes of robbing that person, and that he had learned how to do that when he was fifteen years old. Petitioner admitted searching the victim for money, taking gold chains from the victim's jewelry box, and leaving with petitioner's leather jacket. The fact that petitioner did not ransack the apartment or take the victim's wallet does not mean that petitioner did not commit and intend to commit a robbery. With respect to the aggravated murder, petitioner's intent to kill the victim is manifest not only from petitioner's confession and statements during his mental evaluations, but also from the nature, severity, and number of the victim's wounds. Finally, evidence of petitioner's intent was obvious from the steps he took to avoid detection. Petitioner placed the knife in the victim's stomach, handle down, hoping the victim's blood would dispose of any prints petitioner had left on the knife. Petitioner smeared blood he had left on the refrigerator, in an effort to smear beyond recognition any prints he may have left in the kitchen. After fleeing Ohio, petitioner discarded the leather jacket and gold chains he had taken from the victim. Thus, the omitted evidence, even when considered in the context of the entire record, does not undermine the evidence of petitioner's specific intent to rob and kill the victim, and to escape detection.

The Court is bolstered in its conclusion that the omitted evidence did not create a reasonable probability of a different result by the fact that the

record actually contained some evidence of the theory that petitioner was experiencing homosexual panic when he committed the offenses. Dr. Cooper testified on behalf of the defense during the guilt phase of the trial that when petitioner committed the offenses, he was substantially impaired by a severe personality disorder that was compounded by the consumption of drugs and alcohol. He also testified that petitioner's momentary break with reality was due in part to the conflicted feelings petitioner was experiencing between his heterosexual and homosexual urges. Dr. Schmidtgoessling also referred to homosexual panic during her testimony for the state in the guilt phase and for the defense in the penalty phase, stating that at the time of the offense, petitioner "freaked out" from the conflicted feelings he had about nearly going through with a homosexual act. Whether or to what extent petitioner may have been under the influence of a homosexual panic was explored periodically throughout her testimony. Further, the mental evaluation that Dr. Winter conducted and submitted prior to sentencing also mentioned the possibility that petitioner was experiencing homosexual panic. That said, the various mental health professionals who testified were clear and in agreement that petitioner did not suffer from a mental disease or defect. The Court is not persuaded that the omitted evidence, even when considered in the context of the entire record, would have changed the trial court's conclusion that petitioner was not suffering from a mental disease or defect sufficient to establish a not guilty by reason of insanity defense during the guilt phase or a mitigating factor during penalty phase.

In light of the fact that evidence was presented and presumably considered by the three-judge panel, the Court is not persuaded that the omitted evidence, had it been disclosed to and explored by defense counsel, would have made any difference in the court's verdict or sentence, or that the absence of the evidence undermines confidence in petitioner's conviction or sentence.

The facts do not establish a reasonable probability that petitioner's conviction or sentence would have been different had Dr. Schmidtgoessling's treatment addendum or the Dr. Lippert's psychological profile of petitioner been disclosed. That being so, petitioner is not entitled to relief on grounds D and F because he cannot demonstrate that he was prejudiced by the withholding of the evidence in question, sufficient either to overcome the procedural default of that claim or to establish a *Brady* violation. Petitioner's motion for summary judgment on grounds D and F is DENIED.

3. Ground E - Counsel Failed to Obtain Mental Health Expert to Assist Defense

Petitioner argues in Ground E that his trial attorneys erred in not obtaining, and the trial court erred in not providing, sufficient access to mental health experts to assist defense counsel in both the guilt and penalty phases of petitioner's trial.[3]

---

[3] Petitioner's arguments in support of summary judgment are directed almost exclusively on trial counsel's failure to obtain an independent mental health expert to assist in petitioner's defense.

Petitioner argues that instead of obtaining mental health experts specifically to assist in petitioner's defense, trial counsel relied on court-appointed experts who gave damaging testimony. Because of counsel's failure to present their own expert, the trial court was left with only the conclusions of the court-appointed psychologists that petitioner's borderline personality disorder did not constitute a mental disease or defect. Petitioner reasons that he is entitled to judgment as a matter of law because counsel's unreasonable failure to obtain their own mental health expert prevented petitioner from establishing a not guilty by reason of insanity defense, from defending against the charge of aggravated murder, and from presenting evidence in mitigation of punishment.

Respondent asserts that petitioner has offered no evidentiary basis supporting his allegation that trial counsel were deficient in their preparation, and that the failure of petitioner's trial attorneys to request appointment of an independent expert did not constitute ineffectiveness, because diminished capacity defenses are not recognized in Ohio, because the trial court rejected evidence that was presented about petitioner's homophobic panic, and because the experts who evaluated petitioner were more than adequate in their evaluations and conclusions.

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). With respect to the first prong of the *Strickland* test, the Court notes that, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish the second prong of the *Strickland* test, *i.e.*, prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

Inherent in counsel's responsibilities is the duty to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary." *Strickland, supra*, 466 U.S. at 691; *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992); *see also O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994) (failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted); *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992) (reasonable investigation was lacking, so counsel's performance was deficient). Moreover, the importance of competent representation during the penalty phase of a capital trial cannot be understated, especially with respect to the duty to investigate, since, as a practical matter, all that stands between a defendant who has been convicted of a capital specification and death is whatever mitigation evidence he can muster. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999).

On April 23, 1985, petitioner entered a plea of not guilty by reason of insanity, ("NGRI"). At that time, to succeed upon an NGRI defense, the defendant was required to prove by a preponderance of the evidence that at the time of the commission of the offense, as a result of a mental disease or defect, he did not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law.[4] *State v. Staten*, 18 Ohio

---

[4] By comparison, the mitigating factor set forth in R.C. §2929.04(B)(3) inquires: "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the

St. 2d 13, paragraphs one and two of the syllabus (1969); *see also State v. Coombs*, 18 Ohio St. 3d 123, 124 (1985). In response to petitioner's plea, the trial court appointed three mental health experts to evaluate petitioner.

Dr. Emmet Cooper, a psychiatrist, was called by defense counsel during petitioner's case in chief. He testified that petitioner suffered from a borderline personality disorder, and that at the time of the offense, petitioner's personality disorder, combined with his heavy consumption of alcohol and drugs, caused an acute break with reality that lasted a few minutes. Dr. Cooper went on to testify that petitioner's perception of reality was altered and that he would have had difficulty distinguishing right from wrong. Dr. Cooper also testified that petitioner appeared to have related his actions in killing the victim to a combat situation or fantasy. But Dr. Cooper could not say that petitioner suffered from a mental disease or defect.

Dr. Nancy Schmidtgoessling, a clinical psychologist, testified for the prosecution during its rebuttal case and was also called by the defense during the penalty phase of the trial. Dr. Schmidtgoessling testified that petitioner suffered from a borderline personality disorder, as well as alcohol dependence, marijuana abuse, amphetamine abuse, and a conduct disorder. She testified that petitioner may have been "psychotic" or have been in a brief transitory sort of period at the time of the

---

offender's conduct or to conform the offender's conduct to the requirements of the law.

offense, insofar as he had a grossly distorted view of what was happening. She explained that petitioner was acting out a sort of combat or war hero fantasy that he had long harbored as a form of compensation, but for which he had never gotten in trouble before. She also testified that petitioner's commission of the murder may have been triggered by petitioner's own fear that he was on the verge of committing a homosexual act. She also testified, however, that petitioner never suffered from a mental disease or defect, that he was aware of the quality and wrongfulness of his actions, and that he was able to conform his conduct.

Dr. Teresito Alquizola, a physician and psychiatrist, testified for the prosecution during its rebuttal case. In addition to evaluating petitioner in connection with the aggravated murder and robbery offenses, Dr. Alquizola had evaluated petitioner two years earlier in connection with different offenses. Dr. Alquizola testified that petitioner did not suffer from a mental disease or defect, and that at the time of the offense, he possessed the capacity to know the wrongfulness of his actions and to a large extent, was able to conform his conduct. Dr. Alquizola agreed during cross examination that petitioner's commission of the homicide may very well have been triggered by the attempted sexual act. Dr. Alquizola also testified during cross examination that petitioner may have been experiencing a momentary military fantasy.

In addition to the testimony given by Drs. Cooper, Schmidtgoessling, and Alquizola, a fourth report was prepared by Dr. Donna E. Winter of the

Court Psychiatric Center in connection with the mitigation phase of petitioner's trial, pursuant to R.C. §2947.06. Dr. Winter found that petitioner suffered from a borderline personality disorder, that petitioner was chemically dependent on drugs and alcohol, and that petitioner had concocted a long-term fantasy life in which he was a heroic military man. Dr. Winter opined that petitioner's bizarre and violent attack on the victim was brought on by a fit of rage occasioned either by petitioner's inability to find money or by homosexual panic. Dr. Winter went on to conclude that although the offense may have been a product of a fit of rage that is not uncharacteristic in a borderline personality disorder, at the time of the offense, petitioner was not suffering from a mental disease or defect, that he was able to appreciate the criminality of his actions, and that he was capable of conforming his conduct.

All four doctors reviewed numerous records, notes, and other psychological evaluations. Further, all four doctors demonstrated an understanding that petitioner had endured a chaotic and non-nurturing childhood, that his substance abuse began as early as ten years of age, that he had developed a war hero fantasy to compensate for his insecurities and conflicted feelings, and that during his military service, he had made several suicide attempts, (at least one of which appeared to have been in an attempt to avoid work assignments).

Petitioner argues that his trial attorneys were ineffective for failing to request appointment of an independent expert not to be neutral, but to assist in petitioner's defense. Petitioner argues that counsel's

failure to do so left them completely unable to challenge the various testimony that he was not suffering from a mental disease or defect. Petitioner argues that the absence of any evidence that he was suffering from a mental disease or defect left him unable to demonstrate an NGRI defense, to defend against the aggravated murder and robbery charges, or to present evidence in mitigation of punishment. Petitioner argues that his borderline personality disorder did constitute a mental disease or defect, and that defense counsel committed unreasonable and prejudice error in relying on the experts who testified otherwise during his trial. (Affidavit of Dr. Martin Ryan, Appendix to Petitioner's Motion for Partial Summary Judgment, exh. 9).

Based on the record and relevant case law, the Court concludes that petitioner's trial attorneys did not perform deficiently under *Strickland*. At the outset, it bears reminding that the Sixth Amendment guarantees criminal defendants not the best possible defense, but the effective assistance of counsel. Thus, the Court must confine its inquiry to whether counsel performed reasonably and must undertake that inquiry without the distorting affects of hindsight. *Strickland* and its progeny establish that counsel has a duty to zealously represent the defendant and to subject the state's case to adversarial testing. The record demonstrates that petitioner's trial attorneys were prepared and fulfilled that duty. During the testimony of all three doctors, defense counsel established that the fit of rage and homicide may not have been connected to petitioner's intent to rob the victim, but may very well have been occasioned by homosexual panic on

petitioner's part. Defense counsel also managed to establish during questioning and cross examination that during a brief psychotic state, irrational acts and rational actions can occur at same time such that subsequent rational acts do not diminish the irrationality of previous actions. In other words, counsel endeavored to establish that following the assault, petitioner's apparently rational actions in attempting to conceal his actions could not be construed retrospectively to cast his assault on the victim as rational. Counsel put forth as good an effort as possible to establish that petitioner's personality disorder constituted or was at least as serious as a mental disease or defect. Counsel demonstrated a thorough understanding of the features of borderline personality disorder set forth in the Diagnostic and Statistical Manual of Mental Diseases. That unfavorable testimony was presented does not cast a pallor upon the reasonableness of counsel's performance; *Strickland* has never stood for the proposition that reasonable performance requires counsel to keep out every shred of damaging testimony.

Petitioner appears to be arguing that defense counsel have a duty to shop for an expert that will say exactly and only what counsel want the expert to say. That argument finds no support in case law and the Court squarely rejects it. *See Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000) ("Under the circumstances, trial counsel was not deficient by not canvassing the field to find a more favorable defense expert."), *cert. denied*, 532 U.S. 915 (2001); *Fleenor v. Farley*, 47 F.Supp.2d 1021, 1047 (S.D. Indiana 1998) ("Fleenor's lawyers undertook a

substantial effort to develop defenses based on Fleenor's mental condition, and the results were not promising. In not drilling more deeply in that well, they did not fail to provide effective assistance of counsel."), *aff'd*, *Fleenor v. Anderson*, 171 F.3d 1096 (7th Cir.), *cert. denied*, 528 U.S. 891 (1999). Petitioner's asserts that the failure of his attorneys to secure a better mental health expert was the result of neglect, oversight, or inadvertence – not sound trial strategy. The Court disagrees. Based on the presumption of competency that defense counsel enjoy under *Strickland*, as well as the record, it is reasonable to presume that counsel's decision not to seek yet another expert stemmed not from neglect or laziness, but from the reasonable decision, based on the conclusions of the three doctors who had examined petitioner prior to trial, that the well was dry. *See Jermyn v. Horn*, 266 F.3d 257, 301-302 (3rd Cir. 2001) (finding that counsel's decision not to seek another mental health evaluation was reasonable based on contents of report finding that defendant was competent); *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.) (counsel not required to second-guess content of reports concluding that defendant was not mentally ill at time of the offense), *cert. denied*, *Wilson v. Taylor*, 525 U.S. 1012 (1998).

In addition to finding that petitioner has not satisfied the deficient performance prong of *Strickland*, the Court finds that petitioner has not shown prejudice. To show prejudice, petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland*, *supra*, 466 U.S. at 694. "A reasonable probability is

a probability sufficient to undermine confidence in the outcome." *Id.* Petitioner submitted an affidavit by Dr. Martin Ryan stating that petitioner's borderline personality disorder constituted a mental disease and that any reasonable psychiatrist retained by defense counsel in 1985 would have concluded as much. Had counsel for petitioner "canvass[ed] the field to find a more favorable defense expert," *Dowthitt, supra*, 230 F.3d at 748, petitioner's trial, at best, would have been reduced to a forum of battling experts. Based on the record and the affidavit of Dr. Ryan, the Court is simply not persuaded that there is a reasonable probability that, but for defense counsel's alleged failure to obtain a mental health expert to assist in petitioner's defense, the result of the proceedings would have been different.

Cases finding ineffective assistance of counsel under these circumstances typically involve attorneys who fail completely to conduct any investigation whatsoever, who leave the state's case largely uncontested, who put forward no evidence in support of a defense, and who essentially hang their client out to dry. The record in this case reflects no such ineptitude, inexperience, or inadvertence. For the foregoing reasons, petitioner's motion for summary judgment on Ground E is DENIED.

4. Ground K - Ineffective Assistance of Counsel during Mitigation Phase

Petitioner argues in Ground K that his trial attorneys were constitutionally ineffective in connection with the mitigation phase of his trial. Petitioner argues that counsel abdicated their duty

to investigate, and specifically, that counsel unreasonably requested and relied on a presentence investigation report in lieu of conducting their own investigation, failed to object to victim impact evidence, and relied upon a court-appointed psychologist who provided especially damaging evidence when counsel should have obtained an independent mental health expert.

Respondent asserts that petitioner's trial attorneys presented an extensive case in mitigation, that they acted reasonably in requesting a presentence investigation report as provided for under Ohio law, and that they had no duty to object to victim impact evidence. Respondent also points out that petitioner was tried before a three judge panel. Thus, to the extent that any damaging or improper evidence was present in the record, petitioner was not prejudiced because three judge panels are less susceptible to the passions evinced by prejudicial evidence and are presumed to consider only relevant evidence. Respondent contends that the trial court's sentencing opinion constitutes direct evidence that no improper information was relied upon in their sentencing decision.

As the Court set forth above, the Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *McMann v. Richardson*, *supra*, 397 U.S. at 771 n.14. To prove a claim of ineffective assistance of counsel, the petitioner must show both that his counsel's performance was deficient and that the petitioner was prejudiced by his counsel's deficient performance. *Strickland v. Washington*, *supra*, 466

U.S. at 687. Inherent in counsel's responsibilities is the duty to investigate, *Id.* at 691, and no where is that more critical that in the penalty phase of a capital trial. *Mapes v. Coyle*, *supra*, 171 F.3d at 426.

The statutory mitigating factors that are to be weighed against any aggravating circumstances of which a defendant was convicted are set forth in R.C. §2929.04(B). That section provides in relevant part –

> [T]he court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> (1) whether the victim of the offense induced or facilitated it;
>
> (2) whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> (3) whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform-the offender's conduct to the requirements of the law;
>
> (4) the youth of the offender;
>
> (5) the offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

> (6) if the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
>
> (7) any other factors that are relevant to the issue of whether the offender should be sentenced to death.

R.C. §2929.04(B).

During opening statements of the penalty phase, defense counsel stated that they intended to offer evidence on four of the seven possible statutory mitigating factors set forth in R.C. §2929.04(B). Defense counsel undertook to present evidence that the victim induced or at least facilitated the offense; that at the time of committing the offense, petitioner, due to a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; that the defendant had no history of significant criminal convictions or delinquency adjudications; and that there were other factors relevant to the issue of whether he should be put to death. (Sentencing Tr., 07/31/85, at 537-39).

Defense counsel called eight witnesses and petitioner made an unsworn statement. Ron Light and Michael Ramsay testified that the victim not only willingly left the bar with petitioner that night, but actually invited petitioner to the victim's home. Dr. Cooper testified that petitioner's personality disorder, combined with his consumption that day of

drugs and alcohol, resulted in a period during which petitioner did not accurately perceive right from wrong, and probably could not have appreciated the criminality of his conduct. Dr. Cooper also testified that he generally avoided classifying mental or psychiatric impairments in terms of diseases or defects. Dr. Schmidtgoessling testified that as a result of petitioner's personality and character disorders, combined with his consumption that day of alcohol and drugs, petitioner was substantially impaired at the time of the offense. Petitioner's father, mother, and maternal aunt – Robert VanHook, Joyce Lauttrell, and Marilyn Johnson – testified as to the chaos and substance abuse that dominated petitioner's childhood, as well as the efforts that petitioner had put into succeeding in military service and the devastation petitioner experienced when he failed in those efforts. Petitioner's father further testified as to his disdain for homosexuals, and petitioner's mother emphasized the regret she felt over the role that she and petitioner's father had played in petitioner's situation. Dr. Robert Hoy testified that he had developed a "grand fatherly" friendship with petitioner; that petitioner had an affinity for music, live theater, and the arts; and that petitioner was even-tempered and never violent in Dr. Hoy's presence. During his own unsworn statement, petitioner offered condolences to the victim's family, acknowledged responsibility for what he had done, and explained the struggle he underwent trying to comprehend and accept what he had done.

During closing arguments, defense counsel maintained that they had presented evidence to

satisfy the four mitigating factors they had identified at the beginning of the penalty hearing. Specifically, defense counsel argued that the victim had facilitated the offense by picking up a stranger in a bar and taking him home. Defense counsel argued that several doctors had testified as to petitioner's personality disorders, as well as the effect that heavy consumption of alcohol and drugs had on him as it related to his commission of the offense. Defense counsel urged the three judge panel not to lose sight of that evidence in trying to define the medical and legal terms of diseases or defects. Defense counsel emphasized that petitioner's prior criminal history consisted of only a few minor incidents and was devoid of a single felony conviction. Finally, defense counsel urged the trial court to consider petitioner's childhood and the testimony of Dr. Hoy as relevant evidence militating against a death sentence.

On August 8, 1985, the three judge panel issued its written opinion explaining its conclusion that the aggravating circumstance petitioner had been found guilty of committing outweighed the mitigating factors in his case beyond a reasonable doubt. (Petitioner's Appendix of the State Court Record, Vol. I, at exh. 121). The trial court reviewed evidence presented during both phases of the trial and concluded that there was proof beyond a reasonable doubt that petitioner had committed an aggravated robbery and that he killed the victim while committing the aggravated robbery. The court found that none of the mitigating factors set forth in R.C. § 2929.04 (B)(1-6) existed. The court went on to consider the only other possible mitigating factors, *i.e.*, other factors relevant to the determination of

whether petitioner should be sentenced to death, (R.C. §2929.04(B)(7)), the nature and circumstances of the offense, and the history, character, and background of petitioner. The Court found that petitioner had suffered a tragic and unfortunate upbringing, marked by an absence of love or parental guidance, and dominated by excessive use of drugs and alcohol and constant negative reinforcement of his personality. The court acknowledged petitioner's personality disorder and the manner in which it plagued him, but discounted that he was unable, because of it, to live a normal life. The court further noted that petitioner's intelligence had never been in question.

Petitioner argues that his trial attorneys were constitutionally ineffective for requesting a presentence investigation report instead of conducting their own investigation, for relying on a court-appointed psychologist instead of requesting an independent psychologist, and for failing to object to victim impact statements included in the presentence investigation report. Petitioner argues that by requesting the presentence investigation report, which report is required under Ohio law to be submitted to the trial court and prosecution, defense counsel were unable to control the evidence that would be considered by the sentencer. See R.C. §2929.03(D)(1). Petitioner argues that if counsel had conducted their own investigation, they could have prevented damaging information from being introduced and could have humanized petitioner and painted a more comprehensive picture of him. Petitioner complains that the mitigating evidence defense counsel did present was scant, and that

defense counsel permitted a wealth of damaging evidence to be introduced. Petitioner also argues defense counsel erred in not requesting an independent psychologist, since the court-appointed psychologist who prepared a mental evaluation to go along with the presentence investigation report characterized petitioner as violent and capable of primitive rage. Finally, petitioner argues that his attorneys had a duty to object to the victim impact statement that was included in the presentence investigation report.

Based on the record and relevant case law, the Court concludes that petitioner's trial attorneys did not perform deficiently under *Strickland*. As the Court already emphasized above, the Sixth Amendment guarantees criminal defendants not the best possible defense, but the effective assistance of counsel. *See Laws v. Armontrout*, 863 F.2d 1372, 1384 (8th Cir. 1988) ("[C]ounsel could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984))), *cert. denied*, 490 U.S. 1040 (1989). Thus, the Court must confine its inquiry to whether counsel performed reasonably and must undertake that inquiry without the distorting affects of hindsight. The record demonstrates that defense counsel were prepared, that they had a clear and concise mitigating strategy, and that they presented witnesses to support their strategy.

The Court is not persuaded that counsel performed unreasonably or deficiently in requesting a presentence investigation report and mental evaluation as provided for under Ohio law.[5] Ohio courts have consistently rejected the argument that attorneys are constitutionally ineffective for requesting a presentence investigation report and mental evaluation as provided for under Ohio law. *State v. McNeil*, 83 Ohio St. 3d 438, 450-51 (1998); *State v. Keith*, 79 Ohio St. 3d 514, (1997); *State v. Esparza*, 39 Ohio St. 3d 8, 9 (1988); *State v. Buell*, 22 Ohio St. 3d 124, 138 (1986). That is especially so when any negative information contained in the reports does not harm the defendant and when the report reveals useful evidence in mitigation. In other words, the decision to request a presentence investigation report or mental examination under R.C. §2929.03(D)(1), so long as there was some reasoned basis for it, is generally a tactical decision not to be second-guessed in hindsight. The record confirms that the trial court considered the presentence investigation report and mental evaluation, but the record does not demonstrate that those exhibits played a substantial role in the trial court's conclusion that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. Thus, it would be difficult to

---

[5] The Court has already considered and rejected petitioner's claim that his attorneys were constitutionally ineffective for failing to obtain an independent mental health expert to assist in the defense, and will not address that issue again in this section.

second-guess counsel's decision to request those reports in hindsight.

The Court similarly rejects petitioner's claim that his attorneys performed unreasonably in failing to object to the victim impact statements included in the presentence investigation report, or that petitioner was prejudiced by the victim impact statement and other unfavorable evidence included in the presentence investigation report. With respect to counsel's duty, the Court notes that under *Payne v. Tennessee*, 501 U.S. 808, 825-26 (1991), the *per se* Eighth Amendment bar against the admission of victim impact evidence is lifted, and the inquiry is limited to whether the victim impact evidence was so unduly prejudicial as to render petitioner's trial fundamentally unfair. Prior to *Payne v. Tennessee*, trial courts deliberating imposition of a death sentence were barred from admitting or considering victim impact evidence. *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989). *Payne* overruled those cases. Those circuits that have squarely addressed the issue have concluded that a capital defendant cannot establish a constitutional violation based solely on the admission of victim impact evidence even if his conviction was final before *Payne* was decided. In light of *Booth* and *Gathers*, it could be argued that defense counsel had a duty to object to the victim impact statements included in the presentence investigation report. However, the victim impact evidence in this case was fleeting and benign. It is somewhat difficult to characterize counsel's failure to object to the evidence as unreasonable.

Even assuming that counsel had a duty to object to the victim impact evidence contained in the presentence investigation report, petitioner cannot demonstrate that he was prejudiced by counsel's failure to do so. That is, there is no reasonable probability that, but for counsel's failure to object to the victim impact evidence, the result of the penalty hearing would have been different. For one thing, as noted above, there is no indication whatsoever that the trial court gave weight to the victim impact evidence in determining that the aggravating circumstance outweighed the mitigating factors. Moreover, as the Court noted earlier in this order, petitioner's case was tried to a three-judge panel instead of a jury. It is reasonable to presume that a trial panel, as opposed to a jury, will be scrupulous enough to avoid admitting or considering improper evidence in its sentencing decision. *See State v. Loft*, 51 Ohio St. 3d 160, 176 (1990); *see also State v. Post*, 32 Ohio St 3d 380, 383-84 (1987) (holding that error in admitting victim impact statement did not warrant reversal because the case was tried before a three-judge panel rather than a jury). Such has been the state of the law in Ohio since 1968. In *State v. White*, 15 Ohio St. 2d 146, 151 (1968), the Ohio Supreme Court noted that it would indulge "in the usual presumption that in a bench trial in a criminal case the [trial] court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." Federal circuits considering this question indulge the same presumption. *United States v. Busch*, 758 F.2d 1394, 1398 (10th Cir. 1985); *United States v. Impson*, 562 F.2d 970, 971 (5th Cir. 1977),

cert. denied, 434 U.S. 1050 (1978); *United States ex rel. Placek v. Illinois*, 546 F.2d 1298, 1304-1305 (7th Cir. 1976). Thus, with respect to petitioner's claim that his attorneys were constitutionally ineffective for requesting a presentence investigation report and for failing to object the inclusion in that report of victim impact evidence, the Court concludes that petitioner has not demonstrated ineffectiveness under *Strickland*.

In moving for summary judgment, the crux of petitioner's argument is that his trial attorneys abdicated their duty to investigate, but the record simply does not support petitioner's allegation. In the absence of evidence demonstrating they conducted no investigation, Court is left with presumption of competency to which attorneys are entitled under *Strickland*, and the record itself. The record in this case demonstrates that defense counsel had a thorough awareness and understanding of Ohio's mitigation procedures and what would be necessary to convince the sentencer that the aggravating circumstance in petitioner's case did not outweigh the mitigating factors beyond a reasonable doubt. Counsel demonstrated a comprehensive knowledge of and appreciation for petitioner's background and the mental health issues involved in petitioner's case. Counsel formulated a mitigation strategy based on their investigation and presented witnesses who gave testimony that was relevant and persuasive as to the mitigating factors defense counsel sought to prove. The touchstone of whether counsel's performance was deficient under the first prong of *Strickland* is the *reasonableness* of counsel's conduct, viewed from counsel's perspective at that

time. It is easy enough, after the fact, to criticize a strategy that did not succeed. But that sort of second-guessing and finger-pointing constitutes the very hindsight that *Strickland* cautioned against. The most that petitioner has demonstrated is that counsel could have done more, which is almost always the case. Petitioner has failed to carry his burden in support of summary judgment.

Based on the record and relevant case law, this Court must reject petitioner's claim that his attorneys were constitutionally ineffective in connection with the penalty phase of his case. Petitioner's motion for summary judgment on Ground K is DENIED.

5. Ground N - Ineffective Assistance of Appellate Counsel

Petitioner argues in Ground N that he was denied effective assistance of counsel on direct appeal due to counsel's failure to raise two meritorious issues. Petitioner argues that he was prejudiced by appellate counsel's unreasonable failure to challenge the trial court's admission and consideration of victim impact evidence and the trial court's admission and consideration of non-statutory aggravating circumstances, *i.e.*, "other bad acts" evidence and evidence of petitioner's future dangerousness. Respondent argues that petitioner is not entitled to summary judgment on this issue because the two omitted claims were not as strong as petitioner suggests.

On January 19, 2001, this Court issued an *Opinion and Order* holding, among other things, that

petitioner's appellate counsel ineffectiveness claims as set forth in Ground N appeared to he procedurally barred. *Opinion and Order*, doc.no. 94, at 35-41. Recognizing the emergence of new decisions by the Sixth Circuit and United States Supreme Court and out of an excess of caution, the Court gave petitioner an opportunity to present any *arguable* claims of cause and prejudice in his merits brief. In his brief on the merits, petitioner challenged the Court's procedural default determination, arguing first that he did not violate a firmly established state procedural rule, and arguing in the alternative that he could demonstrate cause and prejudice. As cause, he asserted the ineffectiveness of the attorneys who were representing him at the time that he should have filed a timely application for delayed reconsideration. *See White v. Schotten*, 201 F.3d 743, 751-52 (6th Cir.) (holding that petitioner who was represented by counsel who in turn failed to file a timely application for reopening satisfied cause for the default of appellate counsel ineffectiveness claims), *cert. denied, Bagley v. White*, 53 1 U.S. 940 (2000). To satisfy the prejudice prong of the cause-and-prejudice test, petitioner asserted in his reply brief that the claims omitted by appellate counsel, *i.e.*, that the trial court erred in admitting and considering victim impact evidence and non-statutory aggravating circumstances, were meritorious.

For the following reasons, the Court is not persuaded that petitioner has sustained his burden in proving that he is entitled to judgment as a matter of law on Ground N. The Court remains of the view that Ground N is procedurally barred. Even

assuming that petitioner has shown cause for the default, the record does not support a finding of prejudice sufficient to satisfy the cause and prejudice test or to entitle petitioner to relief – especially when the facts are construed in a light most favorable to respondent.

The Court remains of the view that Ground N is procedurally barred. The basis of the Court's finding of procedural default was that petitioner, without explanation, waited thirteen months to file his *Murnahan* motion for delayed reconsideration. The Ohio courts concluded that petitioner had failed to demonstrate good cause for the untimely filing of his *Murnahan* motion, and after a careful review of the record, this Court agreed. *See Opinion and Order*, doc.no. 94, at 35-41. As for petitioner's argument that he cannot be faulted for failing to comply with App. R. 26(B)(2), since that rule did not become effective until July 1, 1993, his argument was rejected by the Sixth Circuit in *White v. Schotten*, *supra*:

> [T]he first *Maupin* factor requires us to consider whether there is a procedural rule that is applicable to the petitioner's claim and whether he failed to follow that rule. The petitioner argues that there was no procedural rule applicable to his claim because Ohio's App. R. 26(B) was not in effect at the time his direct appeal was decided on January 31, 1991, and he filed an application to reopen his appeal as soon as the claim of appellate counsel ineffectiveness was discovered. We find this argument unmeritorious. Although

> White is correct that prior to July 1, 1993, Rule 26 did not contain a distinct provision for ineffective assistance of counsel claims, it did set forth a ten-day time limit for the "application for reconsideration of any cause or motion submitted on appeal." Following the Ohio Supreme Court's recommendation that the legislature adopt an amendment to better serve defendants who allege ineffective assistance of appellate counsel, (citation omitted), Rule 26(B) was enacted to provide a 90-day limit for ineffective assistance of appellate counsel claims.

White, *supra*, 201 F.3d at 749.

That said, it would appear under *White v. Schotten* that petitioner can demonstrate cause for his procedural default. With respect to default of appellate counsel ineffectiveness claims arising from the failure to file a timely application for reopening of the direct appeal, the Sixth Circuit held in *White v. Schotten*, *supra*, 201 F.3d at 752-53, that a defendant who fails to file a timely Rule 26(B) application for reopening may establish "cause" for that default if he was represented by counsel who failed to file the application within the ninety-day limit. In the instant case, petitioner was represented by two attorneys who failed to file his Rule 26(B) application for reopening in a timely manner. That being so, it would appear under *White v. Schotten* that petitioner can establish "cause" sufficient to excuse the default of his appellate counsel ineffectiveness claims, because *White* held that counsel who fail to file a timely *Murnahan* motion

perform below the constitutionally-mandated minimum standard for competence.

What remains to be determined is whether petitioner can satisfy the "prejudice" prong of the cause-and-prejudice test. That is, petitioner must demonstrate that he was prejudiced by the failure of the attorneys who were representing him to present the state courts with a timely motion for delayed reconsideration. It would seem that such a determination is necessarily interwoven with a determination of relative strength of the claims that petitioner contends his appellate attorneys omitted unreasonably and to his prejudice. Thus, the facts must establish that he is entitled to relief on his claim that his appellate attorneys were ineffective for failing to challenge the trial court's admission and consideration of victim impact evidence and non-statutory aggravating circumstances. The facts in this case do not establish prejudice.

The *Strickland* test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel must provide reasonable professional judgment in presenting the appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). "'[W]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The Court of Appeals for the Sixth Circuit has identified the following considerations that ought to be taken into account in determining whether

counsel on direct appeal performed reasonably competently:

1. Were the omitted issues "significant and obvious?"
2. Was there arguably contrary authority on the omitted issues?
3. Were the omitted issues clearly stronger than those presented?
4. Were the omitted issues objected to at trial?
5. Were the trial court's rulings subject to deference on appeal?
6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
7. What was appellate counsel's level of experience and expertise?
8. Did the petitioner and appellate counsel meet and go over possible issues?
9. Is there evidence that counsel reviewed all the facts?
10. Were the omitted issues dealt with in other assignments of error?
11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Mapes v. Coyle, *supra*, 171 F.3d at 427-28. The Sixth Circuit cautioned, however, that this list is not exhaustive and need not produce a certain "score." *Id.* at 428. Using the *Mapes* list as a guide, the Court cannot conclude that the omitted issues were significantly and obviously stronger than the issues

that were raised on direct appeal, sufficient to conclude that petitioner was prejudiced by the failure of his attorneys to present the state appellate court with a timely *Murnahan* motion for delayed reconsideration raising appellate counsel's failure to include the issues. This Court has carefully reviewed the guilt phase and sentencing phase transcripts, the presentence investigation report and mental evaluation submitted in connection with the sentencing proceedings, the trial court's sentencing opinion, the briefs filed on direct appeal, and the state appellate court's opinion affirming petitioner's convictions and sentence. Cursory statements by the trial court at the conclusion of petitioner's sentencing hearing and in the trial court's sentencing opinion indicate that the three judge panel did consider the presentence investigation report that contained victim impact evidence. However, a review of the trial court's sentencing opinion as a whole, and its reasons for concluding that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt, reveals no evidence whatsoever that either victim impact evidence or nonstatutory aggravating circumstances played a role in the trial court's conclusion. It is clear that the trial court found and weighed only one aggravating circumstance, *i.e.*, that the aggravated murder was committed while petitioner was committing aggravated robbery and that petitioner was the principal offender.

Under *Mapes*, it cannot be said that the issues of whether the trial court erred in admitting and considering victim impact evidence and nonstatutory aggravating circumstances, *i.e.*, "other bad acts"

evidence and evidence of petitioner's future dangerousness, were significantly and obviously stronger than the issues that were raised. As noted above, there is no indication that the allegedly improper evidence factored into the trial court's sentencing decision. Thus, the presence of those issues was not pervasive or compelling such that only an incompetent attorney would have overlooked them. It certainly cannot be said that the omitted issues were significantly and obviously stronger than certain issues appellate counsel raised – particularly the allegedly erroneous admission of petitioner's confession, the trial court's rejection of petitioner's insanity defense, and the trial court's failure to give mitigating weight to petitioner's personality disorder – in light of the considerable attention that was given to those issues. *See State v. Van Hook*, No. C-85-0565 (Ohio App. 1 Dist. May 13, 1987). No objections were made during trial to the admission of victim impact evidence or the alleged introduction of nonstatutory aggravating circumstances.

Mapes also asks whether the trial court's rulings were entitled to deference on appeal and whether the omitted issues were dealt with in other assignments of error. Those issues do not militate in petitioner's favor because the state appellate court was required under Ohio law to conduct an independent review of the aggravating circumstances and mitigating factors, and determine for itself whether the former outweighed the latter beyond a reasonable doubt. Thus, even assuming the trial court considered improper evidence in its sentencing deliberations, the error would have been corrected during the appellate court's independent review.

That said, just as there was no evidence whatsoever that victim impact evidence or nonstatutory aggravating circumstances played a role in the trial court's decision to impose the death sentence, there was no evidence whatsoever that the appellate court gave any weight to such improper evidence in its independent determination that the aggravating circumstance outweighed the mitigating factors.

Petitioner was represented on direct appeal by the same attorneys who represented him at trial. They demonstrated a thorough awareness of the factual record and relevant case law. Further, there are no facts in the record suggesting that counsel failed to meet with petitioner to discuss the issues that should be raised on appeal. In sum, the failure to raise the omitted issues was not an unreasonable act that only incompetent counsel would make.

Some of the factors in *Mapes* favor petitioner's position. Arguably, there was authority that would have supported petitioner's argument that the trial court erred in admitting victim impact evidence, *see Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), and petitioner's appellate attorneys never testified during a collateral proceeding. It cannot be said that appellate counsel raised a substantial quantity of issues on appeal or that every issue counsel raised was pivotal. But the issue before the Court is whether the omitted issues were so significantly and obviously stronger than the issues that were raised, sufficient to support a conclusion that petitioner was prejudiced by the failure of his attorneys to present the state appellate court with a timely *Murnahan*

motion for delayed reconsideration raising appellate counsel's failure to include the issues. After careful consideration of the record and relevant case law, the Court answers that question in the negative.

For the foregoing reasons, the Court concludes that the facts and relevant case law do not demonstrate that petitioner was prejudiced by appellate counsel's failure to challenge on direct appeal the trial court's admission and alleged consideration of victim impact evidence and nonstatutory aggravating circumstances sufficient to overcome the procedural default of Ground N or to entitle him to judgment as a matter of law on Ground N. Petitioner's motion for summary judgment on Ground N is DENIED.

III. Conclusion

For the foregoing reasons, petitioner's motion for partial summary judgment, (doc.no. 103), is DENIED.

s/ GEORGE C. SMITH
United States District Judge

APPENDIX I

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-910505
Trial No. B-851389

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ROBERT J. VAN HOOK,

Defendant-Appellant.

DECISION
Presented to the Clerk of Courts for Filing:
October 21, 1992

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: October 21, 1992

Arthur M. Ney, Jr., Prosecuting Attorney, No. 0009873, and William E. Breyer, Esq., No. 0002138, 411 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee.

Randall M. Dana, Ohio Public Defender, No. 002827, Randall L. Porter, Esq., No. 0005835, and Nathan A. Ray, Esq., No. 0041570, 8 East Long Street – 11th Floor, Columbus, Ohio 43266-0587, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the briefs and the arguments of counsel.

Petitioner Robert Van Hook appeals from the order granting summary judgment to the state on his petition for postconviction relief pursuant to R.C. 2953.21. The trial court held that an evidentiary hearing was not necessary to determine the issues raised in Van Hook's petition and, concurrent with its entry dismissing the action and granting summary judgment to the state, filed its findings of fact and conclusions of law. In this appeal, Van Hook advances eight assignments of error. Because none of these assignments is well taken, we affirm the judgment of the trial court.

Assignment of Error No. 1

In his first assignment of error, Van Hook asserts that the trial court erred in denying him an evidentiary hearing in regard to his petition for postconviction relief. However, the right to such a hearing is not automatic; it is required only when the petitioner adduces sufficient evidence to warrant a hearing. *State v. Jackson* (1980), 64 Ohio St. 2d 107, 413 N.E.2d 819. The trial court must determine

from the petition, the supporting affidavits, and the record whether there are substantive grounds for relief. R.C. 2953.21(C).

In addition, the doctrine of *res judicata* is a proper basis for dismissing an R.C. 2953.21 petition without a hearing. *State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104. The doctrine bars the petitioner from raising in his postconviction petition any matters which were or could have been raised at the time of trial or sentencing or on direct appeal from the judgment of conviction.

In the instant case, the trial court concluded that Van Hook's causes of action numbered one through eight, ten through twelve, fourteen, sixteen through twenty-four, twenty-six through twenty-nine, thirty-one, thirty-two, thirty-four through forty and forty-three presented claims which were or could have been raised during the trial, sentencing or on direct appeal and were, therefore, barred by the doctrine of *res judicata*. As our review of the record supports this conclusion, we concur with the trial court and affirm its denial of an evidentiary hearing on these claims.

Turning to the claims which the trial court found were not specifically barred by *res judicata*, in his ninth cause of action, Van Hook claimed that Ohio's reviewing courts failed to fulfill their statutory obligation, under R.C. 2929.05(A), to meaningfully review the proportionality of his death sentence. The trial court held that this claim cannot be raised in a postconviction proceeding. Whether this court or the supreme court conducted a meaningful review of the proportionality of

petitioner's sentence is an argument that the trial court may not address, because an inferior court has no jurisdictional basis under which it can review the actions and decisions of superior courts. We conclude, therefore, that the trial court correctly denied Van Hook an evidentiary hearing on his ninth cause of action.

In his thirteenth cause of action, Van Hook claimed that his death sentence was disproportionately severe compared to other cases in Hamilton County and was inappropriate because of the absence of opinions in cases where life sentences were imposed. We find this claim to be barred by *res judicata* because, as Van Hook has noted (T.d. 145), it has already been raised and addressed in both direct appeals.

In his fifteenth cause of action, Van Hook alleged that undue pressure was placed on Judge Bettman to impose a harsh sentence on the petitioner. This allegation is without merit because it advances a claim which could have been raised on appeal from the judgment of conviction. See *Perry*, *supra*. Consequently, we affirm the trial court's decision to deny Van Hook an evidentiary hearing on this cause of action.

In his twenty-fifth cause of action, Van Hook asserted that he was denied effective assistance of counsel in the guilt phase of his trial. In support of this assertion, he presented a list of alleged errors of counsel.

"In a petition for postconviction relief, which asserts ineffective assistance of counsel, the

petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *State v. Jackson, supra* (syllabus).

In his petition, Van Hook enumerated many instances where trial counsel was argued to have been ineffective. However, no supporting affidavit or other documentary evidence was provided to support these allegations. Van Hook has not made the necessary showing that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E. 2d 373, certiorari denied (1990), __ U.S. __, 110 S. Ct. 3258. We, therefore, affirm the trial court's holding that Van Hook has failed to establish actual prejudice caused by his counsel's actions, thus obviating the requirement of an evidentiary hearing on his claim.

In his thirtieth cause of action, Van Hook claimed that he was denied the effective assistance of counsel in the mitigation phase of his trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In support of this claim, Van Hook cited a list of instances where counsel was alleged to have been ineffective and offered a number of affidavits of various family members.

The affidavits share a common theme, *i.e.*, that Van Hook's early years were fraught with instability, abuse, violence and an early introduction to substance abuse. During the mitigation hearing,

Van Hook's father, mother and aunt recounted numerous examples of the negative environment in which he was forced to grow up, including the abusive relationship of his alcoholic parents and his being shuffled back and forth between relatives while his parents were on drinking binges. The trial court, in its opinion, recognized that Van Hook had been subjected to a "tragic and unfortunate upbringing." Clearly, the evidence of the tragic circumstances under which Van Hook grew up, as set forth in the supporting affidavits, is merely cumulative to that presented at trial by a number of witnesses.

We support the trial court's conclusion that Van Hook has presented no evidentiary documents demonstrating prejudice. See *Bradley*, *supra*. Moreover, we note that trial counsel presented extensive evidence at the mitigation hearing in addition to the testimony of family members, including a presentence investigation, a psychiatrist, a psychologist, and Van Hook's own unsworn statement.

Van Hook also claimed that trial counsel made certain misstatements of the law. However, as the trial court properly concluded, when a case is tried to the bench, the trial judge (or three-judge panel, as in the present case) is presumed to disregard misstatements of law or prejudicial argument, if, in fact, such misstatements or arguments are made. *State v. Post* (1987), 32 Ohio St. 3d 380, 383, 513 N.E.2d 754, 759; *State v. White* (1968), 150 Ohio St. 2d 146, 151, 239 N.E.2d 65, 70.

Relying on the authority of *Bradley*, *supra*, we affirm the decision of the trial court as to the petitioner's thirtieth cause of action.

In his thirty-third cause of action, Van Hook claimed that he was denied access to experts concerning his mental illnesses in the mitigation phase of his trial. This claim is refuted by the record as both a psychiatrist and a psychologist testified on Van Hook's behalf at the mitigation hearing. Accordingly, we affirm the trial court's decision not to grant an evidentiary hearing on this claim.

In his forty-first cause of action, Van Hook claimed that the trial court erred in denying defense counsel's motion to prohibit death qualification of the jury. This claim is totally without merit as the case was tried to a three-judge panel and not to a jury.

In his forty-second cause of action, Van Hook claimed that he was denied the effective assistance of appellate counsel. In support of this claim, he presented a long list of instances in which counsel was alleged to be ineffective, both before this court and the Ohio Supreme Court. He also offered the affidavit of a criminal defense attorney who set forth what he considered to be the professional standard in the handling of a capital case. The trial court, in rejecting this claim, held that such a claim could not be raised in a postconviction proceeding.

We affirm the decision of the trial court upon the authority of *State v. Murnahan* (1992), 63 Ohio St. 3d 60, 584 N.E.2d 1204, and our longstanding decision in *State v. Rone* (Aug. 31, 1983), Hamilton App. No. C-820640, unreported. In the first

paragraph of the syllabus of *Murnahan, supra*, the Ohio Supreme Court held that "[c]laims of ineffective assistance of appellate counsel are not cognizable in postconviction proceedings pursuant to R.C. 2953.21." The *Murnahan* court also established what remedies were available to a defendant who wanted to raise such a claim.

Consequently, we affirm the decision of the trial court denying Van Hook an evidentiary hearing on his forty-second cause of action.

Van Hook's forty-fourth cause of action alleged cumulative error based on his previous forty-three causes of action. Upon our determination that each cause of action presented in Van Hook's petition for postconviction relief was subject to dismissal without an evidentiary hearing, we affirm the trial court's decision in the forty-fourth cause of action and overrule the first assignment of error.

Assignment of Error No. 2

In his second assignment of error, Van Hook argues that the trial court erred by adopting verbatim the prosecutor's findings of fact and conclusions of law. This argument has been raised many times before this court in postconviction proceedings and we have always held, as we do in the present case, that the trial court's adoption of the findings of fact and conclusions of law submitted by the state does not, by itself, deprive the petitioner of a meaningful review of his petition for postconviction relief and does not constitute error in the absence of demonstrated prejudice. See, *e.g.*, *State v. Zuern* (Dec. 4, 1991), Hamilton App. No. C-900481,

unreported; *State v. Beuke* (Aug. 14, 1991), Hamilton App. No. C-900178, unreported; *State v. Sowell* (June 26, 1991), Hamilton App. No. C-90413, unreported. See R.C. 2953.21(C). Accordingly, the second assignment of error is overruled.

Assignment of Error No. 3

In his third assignment of error, Van Hook asserts that the trial court erred in its application of the doctrine of *res judicata* to the causes of action raised by him. Van Hook argues that causes of action numbers nine, thirteen, fifteen, twenty-five, thirty, thirty-three, forty-one and forty-two are not subject to the doctrine of *res judicata* for various reasons. This argument is meritless because the trial court did not dismiss those causes of action upon the doctrine of *res judicata*. As to the remaining causes of action, our resolution of Van Hook's first assignment of error also resolves the issues raised within this assignment of error as to the application of *res judicata*. The third assignment of error is overruled.

Assignment of Error No. 4

In his fourth assignment of error, Van Hook alleges that the trial court erred when it granted the state's motion for summary judgment when each of the forty-four causes of action set forth a constitutional violation upon which relief should have been granted. In support of this assignment, Van Hook divides his argument into six sections, corresponding to the various stages of the trial.

Upon a thorough review of Van Hook's arguments, we must conclude that they are but

another restatement of the same arguments raised and disposed of within the first assignment of error. Accordingly, for the reasons stated in the first assignment, we support the trial court's conclusion that there are no genuine issues of material fact, and that the state is entitled to judgment as a matter of law. Consequently, Van Hook's fourth assignment of error is overruled.

Assignment of Error No. 5

In his fifth assignment of error, Van Hook asserts that the trial court erred in denying his Civ. R. 11 motion to strike the state's motion for summary judgment of dismissal in its entirety. Van Hook's entire argument concerns the fact that the state included, in its forty-five page motion, a citation to a case from the Cuyahoga County Court of Common Pleas which was never properly placed of record. The state, upon learning this fact, withdrew the citation, and asked the court to disregard all references to it.

Our examination of the state's motion demonstrates that the case to which the state improperly cited was only one of a number of cases cited which stood for the same proposition. It could hardly be said that the state placed "undue reliance" on it, as Van Hook suggests. Clearly, he has demonstrated nothing that would indicate that the state used the improper citation "with the intent to defeat the purpose of [Civ. R. 11]." We hold that the trial court did not err in denying Van Hook's motion to strike the state's motion for summary judgment or dismissal in its entirety. The fifth assignment of error is overruled.

Assignment of Error No. 6

In his sixth assignment of error, Van Hook argues that this court has denied him the opportunity to file an adequate brief, therefore depriving him of due process of law under the Fourteenth Amendment. Van Hook specifically argues that the fifty-page limitation on his brief denies him an adequate corrective process. We overrule this assignment of error on the authority of *State v. Zuern*, *supra*, in which we wrote that a page-limitation claim is unrelated to anything which occurred at trial and, therefore, is not cognizable in a claim for postconviction relief.

Assignment of Error No. 7

In his seventh assignment of error, Van Hook asserts that the trial court erred in denying his motion to recuse itself from his case. This assignment of error concerns claims raised in the petitioner's tenth, twenty-seventh and thirty-seventh causes of action, all of which were examined and rejected in the first assignment of error under the doctrine of *res judicata*. Accordingly, we overrule the seventh assignment of error.

Assignment of Error No. 8

In his eighth and final assignment of error, Van Hook argues that the trial court erred by denying him any opportunity to conduct discovery of facts and evidence essential to justify his opposition to summary judgment. This assignment of error is overruled on the authority of *State v. Zuern*, *supra*, and *State v. Buerger* (Dec. 20, 1989), Hamilton App. No. C-880664, unreported, in which we held that a

trial court is not required to grant discovery during the initial stages of proceedings for postconviction relief.

The judgment of the trial court is, accordingly, affirmed.

HILDEBRANDT, P.J., UTZ and GORMAN, JJ.

Please Note:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX J

SELECTED EXHIBITS TO AMENDED PETITION
TO VACATE OR SET ASIDE SENTENCE:
R.C. SECTION 2953.21

Filed: March 8, 1990

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
Case No. B-851389
Honorable Robert J. Kraft

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

ROBERT JOHNSON VAN HOOK,

Defendant-Petitioner.

EXHIBIT 7
AFFIDAVIT OF ROBERT LEON SALYERS

STATE OF OHIO,

COUNTY OF WARREN, SS:

I, Robert Leon Salyers, after being duly sworn according to law, state as follows:

1) I am the maternal uncle of Robert Johnson Van Hook (Bobby). I am the younger brother of Bobby's mother Joyce.

2) Our parents Lucille and Johnson Salyers required us to go to Church three (3) time a week.

3) Joyce was the black sheep of the family. Joyce had bad friends and was always staying out late.

4) Joyce got married to get away from the Church.

5) Harold Howeller, Joyce's first husband, was a good provider.

6) When I originally met Bob Van Hook he was a cab driver. He could not hold a job. He had tattoos on his hands and arms. He was also a heavy drinker.

7) Bob and Joyce were always moving. They lived at twenty-three (23) different places.

8) Bob and Joyce argued a lot. After one argument I saw that Joyce was bruised. Joyce would go on a drunk for two (2) weeks. Joyce would leave the children with my sister, Marilyn.

9) Mother committed Joyce to Rollman's Psychiatric Hospital when Bobby was four (4) or five (5) years old. After discharge, Joyce was on medication and her behavior improved. Joyce always held this hospitalization against our mother.

10) When Joyce and Bob would separate, Joyce would go on Welfare. Mother would give her food.

11) At the age of five (5) or six (6), Bobby was always running around the house without his pants. Bobby was always fighting with his sisters.

12) Joyce was always spanking Bobby. She would use profanity towards him.

13) Bob was hard on Bobby. Bobby would mind his father, but not his mother. Bob was always hollering at Bobby.

14) After Bobby got out of the armed services in 1979, he worked for me on the farm. Bobby was drinking alcohol because his eyes were dilated all the time.

15) After Bobby was discharged from the Army, he moved in with Joyce and her husband, Clark. Soon after he moved in, the house was burglarized and twenty-five ($25,000) dollars worth of guns were stolen. Clark felt Bobby had some connection to the burglary and wanted Bobby to move out of the house.

16) Bobby would stay overnight with his brother-in-law, Don. Bobby would call him Uncle Don. Don gave Bobby jewelry and Bobby would sell the jewelry.

17) Bobby was a hot head; he had a very bad temper.

18) I was never contacted by Bobby's trial attorneys. If contacted, I would have been willing to testify on his behalf.

Further Affiant saith naught.

s/ ROBERT LEON SALYERS

Sworn to and subscribed in my presence this 14th day of December, 1989.

s/ Notary Public

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
Case No. B-851389
Honorable Robert J. Kraft

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

ROBERT JOHNSON VAN HOOK,

Defendant-Petitioner.

EXHIBIT 8
AFFIDAVIT OF WARREN RICHARDS, M.D.

STATE OF OHIO,

COUNTY OF HAMILTON, SS:

I, Warren Richards, after being duly sworn according to law, state as follows:

1) I am a medical doctor licensed to practice medicine in the State of Ohio. I am a licensed psychiatrist.

2) I treated Joyce Van Hook Luttrell in 1972. At that time she was histrionic with depressive features. She had a labile mood and had verbalized suicidal feelings.

3) I considered hospitalizing her for her own protection, but decided against it.

4) Bobby's family picture was one of psychological disorders that dissipated with age. Both Bobby's father and mother had periods of chaotic behavior that burned out in later years.

5) This trend or condition was probably inherited by Bobby.

6) I sent Bobby's attorneys a letter stating that I was available to testify.

Further Affiant saith naught.

s/ WARREN RICHARDS, M.D.

Sworn to and subscribed in my presence this 17th day of December, 1989.

s/ Notary Public

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
Case No. B-851389
Honorable Robert J. Kraft

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

ROBERT JOHNSON VAN HOOK,

Defendant-Petitioner.

EXHIBIT 12
AFFIDAVIT OF TANNA WALLER

STATE OF ARKANSAS,

COUNTY OF _____, SS:

I, Tanna Waller, after being duly sworn according to law, state as follows:

1) I am the stepsister of Robert Johnson Van Hook (Bobby). Bobby and I have the same mother, Joyce Luttrell.

2) Joyce and Bob Van Hook (my stepfather) were okay on the weekdays, but they would drink heavily on the weekends.

3) On the weekends there would be many loud arguments and physical fights between Joyce and Bob.

4) When Bob was drunk, ~~he always seemed to be trying~~ on different times tried to kill Mom.

5) When I was seven (7) or eight (8) I saw Bob hold a meat cleaver against my mother's throat and threatened to kill her.

6) Once Bob came home and threw my sisters birthday cake against the wall.

7) I have seen Bob hit Bobby since Bobby was three (3) years of age. He would hit Bobby with his hand or fist on the head. He would hit Bobby for anything or trivial things. For instance he would hit Bobby for not feeding the pet correctly.

8) I was never contacted by Bobby's trial attorneys or their investigators. If so contacted, I would have been willing to testify on his behalf.

Further Affiant saith naught.

s/ TANNA WALLER

Sworn to and subscribed in my presence this 13th day of December, 1989.

s/ Notary Public
My commission expires 4-18-1991

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
Case No. B-851389
Honorable Robert J. Kraft

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

ROBERT JOHNSON VAN HOOK,

Defendant-Petitioner.

EXHIBIT 13
AFFIDAVIT OF BILLY VAN HOOK

STATE OF OHIO,

COUNTY OF BUTLER, SS:

I, Billy Van Hook, after being duly sworn according to law, state as follows:

1) I am the paternal uncle of Robert Johnson Van Hook (Little Bobby). I am the brother of Little Bobby's father, Bobby.

2) When I was nine (9) or ten (10) years of age our father ruptured a disc in his back. After the injury our father became a severe alcoholic.

3) He would go to the bar starting early in the morning. With our father drinking, the home was in total chaos.

4) Often other relatives or friends of my father designated as relatives would drink at our home.

5) When my father was drunk, he would use obscene language towards us.

6) My mother was totally controlled by my father.

7) When I was seventeen (17) I saw my father hit my sister Darlene. I then hit my father. My father then signed me into the Army.

8) I saw and knew my brother's second wife, Joyce. She was wild, extroverted, and bold.

9) It was common knowledge that Bobby became involved with drugs at an early age.

10) I was not contacted by Little Bobby's trial attorneys or their investigators.

Further Affiant saith naught.

s/ BILLY VAN HOOK

Sworn to and subscribed in my presence this 14th day of December, 1989.

s/ Notary Public

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
Case No. B-851389
Honorable Robert J. Kraft

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

ROBERT JOHNSON VAN HOOK,

Defendant-Petitioner.

EXHIBIT 14
AFFIDAVIT OF DARLENE VAN HOOK WHITSON

STATE OF OHIO,

COUNTY OF BUTLER, SS:

I, Darlene Van Hook Whitson, after being duly sworn according to law, state as follows:

1) I am the paternal Aunt of Robert Johnson Van Hook (Bobby). I am the younger sister of Bobby's father, Bob Van Hook.

2) Our father, Robert Jessie Van Hook, was a mechanical genius.

3) Our parents were very strict. I could not date until I was sixteen (16) years of age. I could not have friends over to the house. I had to be in by dark, and I had to wear my dresses at a certain length.

4) Our dad was always drinking. He would come home at 3:00 a.m. and would ask our mother what we had done. He yelled, but did not give us many whippings. Everyone was afraid of Dad, even our mother.

5) Our dad was the master of the house. He was big and powerful. The women did the laundry and dishes.

6) Bob and Joyce, Bobby's parents, worked night shift. When the couple got off work, they did not want to be bothered by the children. If Bobby cried, they would whip him. When I baby-sat for them, I would frequently have to wash diapers that had been sitting for weeks.

7) After I was married I thought of obtaining legal custody of Bobby. However, I gave up the idea when Joyce promised to fight me.

8) Bobby, as a child, was constantly sick.

9) Bobby began skipping school in the first grade. He would go fishing. School was not fun to him.

10) When Joyce and Bob were not getting along, Joyce would unexpectedly leave Bobby at the Bar where Bob was playing as a musician. She would not come back for a week.

11) Joyce was quite jealous of Bob and this led to many ~~physical~~ verbal fights.

12) Bob was seeing his third wife when he was still married to Joyce. When he married his third wife, he started having an affair with Joyce.

13) Bobby, as he grew older, made numerous suicide attempts.

14) Bobby also smoked marijuana.

15) I was not contacted by Bobby's trial attorneys.

Further Affiant saith naught.

s/ DARLENE VAN HOOK WHITSON

Sworn to and subscribed in my presence this 14th day of December, 1989.

s/ Notary Public

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
Case No. B-851389
Honorable Robert J. Kraft

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

ROBERT JOHNSON VAN HOOK,

Defendant-Petitioner.

EXHIBIT 15
AFFIDAVIT OF FRIEDA ROLL

STATE OF OHIO,

COUNTY OF HAMILTON, SS:

I, Frieda Roll, after being duly sworn according to law, state as follows:

1) I am the maternal ~~uncle~~ aunt of Robert Van Hook (Bobby). Bobby's mother, Joyce, is my sister.

2) Joyce was an active and popular child until our father's death.

3) When our father was ill, Joyce would sit with him for hours at a time.

4) The day my father died, he called the school and told them to send Joyce and ~~me~~ Vivian home. Joyce was first to reach home and our father had already died.

5) Joyce was deeply affected by our father's death. She was heavily sedated and kept out of school for long periods of time.

6) One of our uncles kept telling our mother that ~~we~~ they should be placed in an orphanage.

7) Joyce became wild and she began to drink heavily. My mother could not control her.

8) My mother admitted Joyce to Rollman's Psychiatric Hospital.

9) Joyce was released shortly before her marriage to Harold Howeller.

10) Joyce and Harold had two children. Harold repeatedly abused Joyce.

11) After Harold and Joyce separated, Joyce began drinking again. Joyce would telephone people at all hours and cuss at them including me.

12) Joyce met Bobby's father at a nightclub.

13) Bobby came to live with us for a few months when Bobby was four (4) years of age.

14) Bobby lived with us on the weekdays and lived with his father on the weekends.

15) Joyce eventually married Clark Luttrell who was also physically abusive to Joyce.

16) I attended Bobby's trial every day with my husband. I was never interviewed by the attorneys. If so requested I would have been willing to testify.

Further Affiant saith naught.

s/ FREIDA ROLL

Sworn to and subscribed in my presence this 14th day of December, 1989.

s/ Notary Public

APPENDIX K

THE STATE OF OHIO, APPELLEE,
v. VAN HOOK, APPELLANT.

[Cite as State *v.* Van Hook (1988),
39 Ohio St. 3d 256.]

Criminal law-Aggravated murder-Custodial interrogation-Right to counsel-Suspect may reinitiate interrogation before counsel has been provided, when.

O.Jur 3d Criminal Law §§ 172, 336.

1. When a suspect who is being interrogated requests to speak with an attorney, all interrogation must cease and police may not reinitiate an interrogation until counsel has been provided.

2. A suspect who has ended interrogation by requesting the assistance of counsel may himself reinitiate the interrogation before counsel has been provided. (*Edwards v. Arizona* [1981], 451 U.S. 477, and *Arizona v. Roberson* [1988], 486 U.S. __, 100 L. Ed. 2d 704, 108 S. Ct. 2093, followed.) He may also reinitiate such interrogation through the agency of a non-attorney third party.

(No. 87-1159-Submitted June 14, 1988-Decided November 9, 1988.)

APPEAL from the Court of Appeals for Hamilton County, No. C-850565.

It was established at trial that on the evening of February 18, 1985, Robert Van Hook, appellant

herein, went to a downtown Cincinnati establishment called the Subway Bar. There, he approached David Self. The two engaged in conversation while consuming alcoholic beverages for approximately two to three hours. As they left together, Self stopped briefly to explain to the bartender that he and appellant were planning to go to Self's apartment.

At the apartment, appellant lured Self into a vulnerable position and with no provocation, attacked him. Initially, appellant strangled Self into a state of unconsciousness. He then took a paring knife from the victim's kitchen and stabbed the victim behind the right ear, aiming the thrust upward toward the brain, accompanied by a blade-twisting movement. Appellant then stabbed the victim's neck in numerous places, each stab wound accompanied by cutting motions. Several of these wounds penetrated over halfway through the neck and apparently represented appellant's efforts to decapitate the victim. Appellant then made an incision on the victim's body from the abdomen up to and over the sternum. The victim's abdominal cavity was opened so that his liver was visible. Appellant then stabbed upward a number of times, penetrating the liver and eventually penetrating the abdominal wall into the heart in three places. He placed a small bottle which had contained amyl nitrate, its cap, a cigarette butt and the paring knife into the victim's abdominal cavity.

Appellant then searched much of the apartment including a chest of drawers and a jewelry box. There was evidence that particular items of jewelry were taken, including specific testimony that the victim's gold chain necklace, which he had worn into the bar earlier that evening, was missing.

Thereafter, appellant looked into the victim's refrigerator for food, but not seeing anything that "[he] liked," he prepared his departure from the apartment. Such preparation included smearing his bloody fingerprints, and turning up the volume on the stereo system.

After leaving the apartment, appellant went to the home of Dr. Robert Hoy, a family friend. There, under the guise of recovering from a fight with his stepfather, appellant borrowed money and ate a large meal. He then left and eventually arrived in Ft. Lauderdale, Florida. There, he evaded detection until April 1, 1985, when, pursuant to information given by appellant's family, he was arrested by the Oakland Park police.

Subsequently, appellant was indicted for the offenses of aggravated murder in violation of R.C. 2903.01 and aggravated robbery in violation of R.C. 2911.01. A specification was also contained in the indictment that appellant committed the aggravated murder during the course of an aggravated robbery and that he was the principal offender. R.C. 2929.04(A)(7). Appellant pled not guilty and not guilty by reason of insanity.

Appellant waived his right to a trial by jury, electing to be tried instead by a three-judge panel. Appellant was found guilty of both charges as well as the aggravating circumstances specified. Following the sentencing phase, the three-judge panel, for the reasons set forth in its opinion filed pursuant to R.C. 2929.03(F), imposed the sentence of death upon appellant for the crime of aggravated murder and also imposed a concurrent indefinite term of ten to twenty-five years for the crime of aggravated robbery. The court of appeals, having performed its statutory independent analysis of the record and the

proportionality of the sentence, affirmed the sentence in all particulars.

The cause is before this court pursuant to an appeal as of right.

Arthur M. Ney, Jr., prosecuting attorney, *Leonard Kirschner*, *William E. Breyer* and *Theodore J. Froncek*, for appellee.

William Stewart Matthews II and *Richard L. Bell*, for appellant.

HOLMES, J. Appellant asserts as his first proposition of law that the trial court failed to suppress the confession given by appellant to Cincinnati homicide detective William Davis. The confession was made while appellant was in the custody of the Broward County Sheriff's office in Ft. Lauderdale, Florida, awaiting extradition to Cincinnati. Actually, the Ft. Lauderdale police had sought appellant for some time in their area. This was upon the recommendation of Detective Davis, who had received information through telephone calls from appellant's family.

On the morning of April 1, 1985, appellant was arrested by the combined forces of the Ft. Lauderdale and the Oakland Park Police Departments. While at the Oakland Park police headquarters, he was advised of his *Miranda* rights. At that time, he acknowledged that he wished to make a statement without an attorney present, but then added: "Maybe I should have an attorney." Interpreting this statement as an invocation of the right to counsel, police ceased all interrogation and informed the Cincinnati homicide department of the arrest. Appellant was then transferred to the Broward County Sheriff's Department. No attorney was provided to appellant between the time when

police ended their interrogation and the time, some hours later, when appellant confessed to the Cincinnati homicide detectives.

At 9:20 p.m., the detectives arrived at the Broward County Sheriff's office, where they met with appellant. Initially, they discussed the extradition of appellant to Cincinnati. Apparently appellant had, subsequent to his post-arrest interrogation, voluntarily communicated to the Ft. Lauderdale police that he desired to waive the extradition process so as to expedite his return to Cincinnati. This had been communicated to the homicide detectives prior to their departure from Cincinnati. They sought to confirm these facts and also to inform appellant of their intention to leave for Cincinnati on the following day.

During the conversation, Detective Davis told appellant that he, Davis, had been in contact with appellant's mother and that "we had a lot to talk to him about." The detective informed him that the detectives could not talk to him unless appellant wanted to talk to them and make a statement. Appellant replied that he also had spoken with his mother, that she had advised him to "just tell the truth," and that he wanted to make a statement. Thereafter, police explained the *Miranda* rights to him, specifically asking if he now desired an attorney, to which he replied that he did not. Appellant then signed a Notification of Rights/Waiver of Rights form. Afterwards, a recording device was turned on and the police again explained to appellant all of his *Miranda* rights, pausing after each right to inquire whether appellant understood. They informed him that he could end the session at any time, after which they also inquired as follows:

"Q. Okay. And uh you do wanna make uh statement. Is that correct?

"A. Yes.

"Q. An' I understand that you were arrested today at approximately what time?

"A. 10:50 this morning.

"Q. Okay, an' as you were being booked, you were given your rights by Sgt., I believe, Perry.

"A. Yes.

"Q. Okay, an' I also understand at that time you indicated to him that you wanted to make uh statement but that you wanted to confer with a lawyer first.

"A. Right.

"Q. Okay. But you have since changed your mind. Is that correct?

"A. Yes.

"Q. Okay, an' this is being done of your own free will, correct?

"A. Yes sir.

"Q. Okay. Nobody's used any force, no coercion of any kind against you to make a statement?

"A. No.

"Q. Can you explain why you changed your mind?

"A. Uh, I talked to my Mom today an' she jus' told me, you know, be cooperative an' jus' tell the truth.

"Q. An' that's when you, you, did you say

you're waivin' your rights to an attorney at this time, after talkin' to your Mom[?]

"A. Right."

Appellant then made a full and graphic confession, which is attached hereinafter as the Appendix. The confession included an admission to the killing of David Self as well as to the robbery.

Appellant now asserts that the confession should have been suppressed in its entirety because it was the product of an interrogation which occurred *after* appellant requested to speak with an attorney and which thus violated the mandate set forth in *Edwards v. Arizona* (1981), 451 U.S. 477.

In *Edwards*, it was held that a suspect who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself* initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85. In subsequent cases, it has been determined that police may not reinitiate an interrogation under the guise of a "generalized discussion * * * [about] the investigation." *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 1045. Also, in *Wyrick v. Fields* (1982), 459 U.S. 42, 46, it was held that interrogation may not resume "unless the suspect himself initiates dialogue with the authorities." Most recently, these views were reaffirmed in *Arizona v. Roberson* (1988), 486 U.S. ___, 100 L. Ed. 2d 704, 108 S. Ct. 2093.

Having reviewed the record as well as the applicable case law, we conclude that the trial court did not err when it refused to suppress the confession at issue because the record demonstrates that appellant himself reinitiated his own interrogation

through a third party. At the hearing on appellant's motion to suppress, Detective Davis was questioned about how he came to believe that appellant had changed his mind and now wished to make a statement without the benefit of counsel:

"Q. And immediately after Mr. VanHook indicated that to you did you provide him with the Miranda warning –

"A. Yes, sir.

"Q. -- and the reason –. Had you had communications with Mr. VanHook's mother before going to Florida?

"A. Yes, sir.

"Q. And, had she indicated to you that she had talked to Mr. VanHook?

"A. She had.

"Q. And did she indicate to you anything that Mr. VanHook had told her?

"Mr. Mathews: To which I object.

"The Court: Objection will be sustained.

"Q. After speaking with Mrs. VanHook, did you think that Robert VanHook might want to talk to you?

"Mr. Mathews: To which I object.

"The Court: Overruled. You may answer that.

"A. Yes, I did.

"Q. And why was that?

"Mr. Mathews: To which I object.

"The Court: Just a moment. Objection

overruled.

"A. She told me –

"The Court: [Objection sustained.]."

Throughout the hearing, it was made clear that appellant had called his mother while he was in the custody of the Florida police. Detective Davis testified that thereafter he had been in communication with appellant's mother, and that this was prior to his flight to Ft. Lauderdale. It was Detective Davis's specific testimony that he conceived a belief that appellant would *want* to talk to him because of what '[s]he [appellant's mother] had told me --."

Although it is abundantly clear that the trial court erroneously excluded the content of appellant's statements to his mother, see Evid. R. 101(C)(3) and 104(A), we observe that such content is inferable from the record, specifically, that appellant had told his mother that he wanted to talk to Detective Davis. Concerning the initial part of Detective Davis's meeting with appellant, at which point no interrogation had occurred, but during which appellant stated that he would waive extradition, the detective testified as follows:

"We advised him that we had a lot to talk to him about. I advised him that *I had been in contact with his mother*, [and] * * * that we could not talk to him unless he wanted to talk to us and make a statement. He at that time replied that he had talked to his mother, and she had advised him to just tell the truth, and that he had, *that he did want to make a statement*." (Emphasis added.)

This was reaffirmed in the taped conversation wherein appellant repudiated his earlier request for

an attorney and stated that he had changed his mind earlier that day during a conversation with his mother.

As previously indicated, Detective Davis's belief that appellant would want to talk to him occurred after and because of what appellant's mother had said to him. In the context of this conversation, both appellant and Detective Davis predicated their conversation upon what had been spoken with appellant's mother. It is most clear that appellant had agreed to act upon his mother's advice "to tell the truth" and thus to "make a statement." Obviously, this was the subject of appellant's conversation with his mother, and he communicated his agreement to do so to her. That this had been communicated to Detective Davis is quite apparent from the context in which the detective utilized the fact of his conversation with appellant's mother, *i.e.*, as a basis for inquiring whether appellant indeed wished to make a statement. It would have had little meaning, particularly in light of appellant's response, unless both men understood that appellant's desire to make a voluntary statement had been communicated to Detective Davis through appellant's mother. Such communication constituted a reinstitution of conversation with police. A suspect who has ended interrogation by requesting the assistance of counsel may himself reinitiate the interrogation before counsel has been provided. *Edwards v. Arizona* (1981), 451 U.S. 477, and *Arizona v. Roberson* (1988), 486 U.S. __, 100 L. Ed. 2d 704, 108 S. Ct. 2093. He may also reinitiate such interrogation through the agency of a non-attorney third party.

Our conclusion is further strengthened by the clarity with which appellant expressed his resolve to

speak with police and his explanation that it was based upon discussion which he initiated with his mother. Furthermore, the decision to speak apparently had been reached earlier in the day, and thus well before he met with Detective Davis. As such, the decision was made independently of anything police had said or done, and only after the most excruciating care had been taken to assure the voluntariness of appellant's statement. Moreover, the record reveals that appellant is both articulate and intelligent. See, *e.g.*, his unsworn statement made during the sentencing phase. Once an accused "knowingly and intelligently" elects to proceed without counsel, the uncounseled statements he then makes need not be excluded at trial. *Patterson v. Illinois* (1988), 487 U.S. __, __, 101 L. Ed. 2d 261, 271-72, 108 S. Ct. 2389, 2393-94. Accordingly, we affirm the introduction of appellant's confession into evidence.

Appellant's second proposition of law challenges the admissibility of this confession on the ground that the corpus delicti of the aggravated murder was not established. Appellant argues that, where a defendant is charged with aggravated murder while committing, attempting to commit, or fleeing the commission or attempted commission of aggravated robbery, R.C. 2903.01(B), the state must separately prove the corpus delicti of the aggravated robbery as well as that of the homicide before a confession to both is admissible in its entirety. According to appellant, the court should have redacted the confession, leaving out those matters which were pertinent to the theft of the gold chains and a leather jacket.

The corpus delicti of a crime consists of two elements: the act and the criminal agency of the act.

State v. Maranda (1916), 94 Ohio St. 364, 114 N.E. 1038. Before an out-of-court confession will be admitted, the corpus delicti must be established by evidence outside the confession. However, "[i]t is sufficient if there is *some* evidence outside of the confession that tends to prove *some* material element of the crime charged." (Emphasis *sic.*) *Maranda, supra*, at paragraph two of the syllabus. For example, when the offense is homicide, the corpus delicti "involves two elements, *i.e.*, (1) the fact of death and (2) the existence of the criminal agency of another as the cause of death." *State v. Manago* (1974), 38 Ohio St. 2d 223, 226-227, 67 O.O. 2d 291, 293, 313 N.E. 2d 10, 13.

The purpose of requiring the evidence of the corpus delicti as a foundation for admitting a confession was explained by the *Maranda* court: "The doctrine * * * was born out of great caution by the courts, in consideration of certain cases of homicide wherein it had turned out that by reason of the failure of the government to prove the death of the person charged as having been murdered it so happened that such person sometimes survived the person accused as his murdered." *Maranda, supra*, at 370, 114 N.E. at 1040. In light of the myriad procedural protections granted defendants in modern criminal practice, however, "the *corpus delicti* rule is supported by few practical or social policy considerations." This court has refused to apply it "with a dogmatic vengeance." *State v. Edwards* (1976), 49 Ohio St. 2d 31, 35-36, 30 O.O. 3d 18, 21, 358 N.E. 2d 1051, 1056.

With this view before us, we point out that we have ordinarily required separate proof of the corpus delicti of both the homicide and the robbery. *E.g.*, *Edwards, supra*, at 35, 3 O.O. 3d at 20, 358 N.E. 2d

at 1056; *State v. Black* (1978), 54 Ohio St. 2d 304, 308, 8 O.O. 3d 296, 297 376 N.E. 2d 948, 951. We hasten to point out, however, that the standard of proof is not a demanding one. The prosecution need only adduce "*some* proof * * * *tending* to prove [the act and its agency]," but not necessarily such evidence as would rise to the level of a prima facie case. (Emphasis added in part.) *Maranda, supra*, at 370-371, 114 N.E. at 1040. Also, as previously mentioned, Ohio does not require evidence upon all elements of the crime but only "*some* material element." *Maranda, supra*, at paragraph two of the syllabus.

Turning to the case before us, evidence that the victim was murdered is evidence that deadly force and a deadly weapon were utilized. Also, at trial, Stephen Wood testified that at about 9:00 a.m. on February 19, he noticed that the door to David Self's apartment was open. Wood went inside and found the victim's body. He testified that the victim's apartment was "neat most of the time," but that "*things* were * * * tossed around" the apartment. In support of this, the state adduced photographs taken of the apartment as it was discovered on the morning after the murder. State's exhibit 32 shows the desk in the victim's bedroom with its drawer missing. State's exhibit 33 shows the missing drawer lying face up on top of the air conditioner, and near the bed. State's exhibit 31 shows a dresser in the victim's bedroom. One drawer is open, as is the jewelry box on top of the dresser. State's exhibit 36 shows a small piece of jewelry located on the floor near the dresser. This evidence of the general disarrayed condition of the apartment, together with the specific fact that normally closed containers in which valuables were customarily kept were found open with the contents upon the floor, would indicate

that a search was made of the premises, and that by the killer.

Finally, and of even greater significance, the bartender at the Subway Bar testified that the victim wore a gold chain around his neck when he left the bar with appellant on the night of his murder. The state conclusively demonstrated that the body as found did not have the chain upon it. This chain was never recovered. Its unexplained absence coupled with the circumstances of the murder strongly indicates that the gold chain was stolen.

Appellant asserts that someone other than appellant might have been responsible for the apartment's condition, since the door had been left open and at least one other person entered before police arrived. However, the identity of the criminal agent is not part of the corpus delicti, since the purpose is simply to establish that the crime occurred. See, *e.g.*, *Groves v. State* (Ind. App. 1985), 479 N.E. 2d 626. Nor is it necessary to establish that the evidence exclude all other reasonable theories. *Black, supra.*

In conclusion on this point, there was considerable evidence that the victim had been robbed as well as murdered. Accordingly, there was sufficient evidence *dehors* the confession to firmly establish the corpus delicti predicate for its admission.

By his third proposition of law, appellant asserts that the trial court erroneously determined that the mitigating factor found in R.C. 2929.04(B)(3) did not exist. This statute states:

"Whether, at the time of committing the offense, the offender, because of a mental disease or

defect, *lacked substantial capacity* to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law[.]" (Emphasis added.)

The trial court's conclusion, set forth in its sentencing opinion and relied upon by appellant, asserted the following:

"* * * [T]he defendant has *never* suffered from a mental disease or defect which would have prevented the defendant from distinguishing right from wrong or would have prevented him from conforming his conduct to the requirements of the law. In other words the *defendant has never suffered from any psychosis*. Instead, he has been diagnosed over many years as having a borderline personality disorder which manifests itself in all types of antisocial behavior. This disorder is not a product of a mental illness or disease, so says the overwhelming weight of the professional testimony." (Emphasis added.)

Appellant's argument is premised upon the testimony of his psychiatrist, Dr. Emmett Cooper, who provided expert testimony during the sentencing phase. During the guilt phase, he asserted that appellant suffered from "a borderline personality disorder" characterized by impulsive behavior, self-damaging acts, substance abuse, unpredictable behavior, lack of control of anger, problems with self-control and gender identity, and mood swings. He stated further that the appellant had chronic feelings of impotence, loneliness, boredom, depression and irritability. It was the expert's conclusion that appellant experienced "an acute break with reality and acute psychosis" which interfered with his ability to perceive right from wrong.

Even a cursory glance at these alleged

indications of "borderline personality disorder" demonstrates the reasonableness of the trial court's conclusions. Although the prosecution presented no evidence to rebut the expert's contentions, the psychiatric opinions offered during the guilt phase, which were fully available for consideration during the sentencing phase, overwhelmingly agreed that appellant was not suffering from any mental disease or defect. Further, the court concluded that appellant's claim of voluntary intoxication, and that it caused him to lose "touch with reality for some unspecified period of time while he mutilated the body of the victim," was nothing more than an attempt by appellant "to weave a story which might cause the three-judge panel to conclude that he was not in control of his faculties at the time he committed this heinous act." Dr. Cooper's testimony was based upon his assumption that appellant had indeed ingested alcohol and drugs just prior to the offense. In commenting specifically upon this testimony, the court refused to accept Dr. Cooper's theory of "the defendant's bizarre conduct." Having concluded that there was no "mental disease or defect" because of which appellant lacked the "substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law," the court was fully justified in refusing to find the existence of a mitigating factor under R.C. 2929.04(B)(3).

Appellant also asserts under this same proposition of law that the standard to establish the above mitigating factor is identical to that required to find one not guilty by reason of insanity. Thus, once an insanity defense is disproved by the state in the guilt phase, a mitigating factor under R.C. 2929.04(B)(3) would be automatically precluded. We note that the mitigating factor as set forth above

utilizes the term "substantial capacity" which is a term allowing a broader range of conditions than the terms "capacity" standing alone. Of course, under either standard, it must be demonstrated that such lack of capacity resulted from a mental disease or defect. This appellant has failed to do.

Further, appellant argues that even if his mental state could not be characterized as a mental disease or defect, his condition should have been considered under R.C. 2929.04(B)(7)'s catchall provision for: "Any other factors that are relevant to the issue of whether the offender should be sentenced to death." However, the trial court found as follows:

"It is true, that the defendant was afflicted with deficiencies of personality which suggested that he was destined to get into trouble. However, those same personality characteristics which allowed him to live and work within a community and society in a peaceful fashion when he chose to, compels [*sic*] this Court to a conclusion that the defendant functioned as a *rational human being* during the period of time surrounding the criminal activity of which he has been convicted." (Emphasis added.)

Accordingly, the trial court found, as we also do, that appellant's ability to distinguish right from wrong and/or to conform his conduct so as to abstain from the wrong was *not* impaired at all. There is therefore no need to consider the issue of such impairment under the catchall phrasing of R.C. 2929.04(B)(7).

Appellant, by his fourth proposition of law, asserts several arguments against the constitutionality of capital punishment and the Ohio statutes pertinent thereto. It is initially asserted

that the multiple use of aggravated robbery to provide both the aggravating factor for aggravated murder and the specification rendering the offender eligible for the death penalty fails to constitutionally narrow the class of murderers to those deserving of the death penalty. Additionally, the same reasoning is applied to the use of the aggravated robbery charge during the sentencing phase of the trial. We have previously considered and rejected these arguments in *State v. Poindexter* (1988), 36 Ohio St. 3d 1, 3-4, 520 N.E. 2d 568, 571; *State v. Greer* (1988), 39 Ohio St. 3d 236, 530 N.E. 2d 382; *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 177-178, 15 OBR 311, 322-323, 473 N.E. 2d 264, 279-280; *State v. Williams* (1986), 23 Ohio St. 3d 16, 23, 23 OBR 13, 20, 490 N.E. 2d 906, 914. Furthermore, the standards of appellate review set forth in the statute are fully sufficient to constitutionally guide appellate analyses in capital cases. *Proffitt v. Florida* (1976), 428 U.S. 242; *Jurek v. Texas* (1976), 428 U.S. 262.

Also, appellant challenges the provisions of Crim. R. 11(C)(3) which allow the trial court to dismiss the death penalty specification if the one so indicated pleads guilty and the "interests of justice" so require. It is asserted that the "interests of justice" standard is so vague as to be unconstitutional and also that it unfairly encourages pleas of guilty. We have already determined that the rule's standard provides sufficient guidance to the trial court's discretion. *See, e.g., State v. Nabozny* (1978), 54 Ohio St. 2d 195, 200, 8 O.O. 3d 181, 183, 184, 375 N.E. 2d 784, 789. Nor does Crim. R. 11(C)(3) improperly encourage guilty pleas. *State v. Steffen* (1987), 31 Ohio St. 3d 111, 125-126, 31 OBR 273, 286, 509 N.E. 2d 383, 396; *State v. Buell* (1986),

22 Ohio St. 3d 124, 138, 22 OBR 203, 215, 489 N.E. 2d 795, 808.

Appellant further argues under this proposition of law that the Ohio death penalty statute is unconstitutional for the following reasons: it does not allow the jury to grant mercy; it requires the jury to recommend death if aggravating circumstances even slightly outweigh the mitigating factors; it is not the least restrictive means of achieving permissible state interests; and the statute does not require the jury to explain its recommendation in writing, does not require the trial and appellate courts to apply the reasonable doubt standard to their independent review, and does not give guidelines for the proportionality review. These arguments have all been previously considered and rejected by this court. *Steffen, supra*, at 125, 31 OBR at 285-286, 509 N.E. 2d at 396; *Jenkins, supra*, at 167-168 and 176-177, 15 OBR at 314 and 321-322, 473 N.E. 2d at 272 and 278-279; *State v. Zuern* (1987), 32 Ohio St. 3d 56, at 63-64, 512 N.E. 2d 585, at 592-593. Appellant finally argues that the death penalty is disproportionately severe in this case because the county prosecutor has declined to seek it in other cases involving aggravated murder in the commission of aggravated robbery. "This issue was not raised at trial and [appellant's] allegations are therefore not supported by the record." *State v. Byrd* (1987), 32 Ohio St. 3d 79, 86, 512 N.E. 2d 611, 619. They are deemed waived. *State v. Greer, supra.* Moreover, we have upheld such exercise of prosecutorial discretion in prior cases. See *Greer, supra*, at 247, 530 N.E. 2d at 382. We now independently evaluate whether the aggravating

circumstances which characterized appellant's conviction outweighed that evidence set forth as mitigation during the sentencing phase. A review of the record discloses that none of the mitigating factors set forth in R.C. 2929.04(B)(1) through (6) is applicable. Appellant presented notable evidence to the effect that his mental condition was either diseased or defective and/or that the events resulted from ingestion of drugs and alcohol. In light of the record, we find such theories not to be credible. Although we are persuaded that appellant experienced considerable difficulty due to an emotionally unstable home life while growing up, many persons encounter such difficulties without turning to violent criminal conduct. Moreover, the evidence of the aggravating circumstances associated with this savage murder and robbery clearly overwhelms the scant evidence offered in mitigation.

We now consider whether the sentence imposed upon appellant in this case is disproportionate or excessive in comparison with the penalty imposed in cases with similar facts. This court has approved the death penalty in prior cases of aggravated murder involving an aggravated robbery. See, *e.g.*, *State v. Post* (1987), 32 Ohio St. 3d 380, 395, 513 N.E. 2d 754, 768, and cases set forth in fn. 10; see, also, *Greer*, *supra*. We now conclude that the sentence of death is neither excessive nor disproportionate, but, in light of the facts of the case before us, is appropriate.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, LOCHER and DOUGLAS, JJ., concur.

WRIGHT and H. BROWN, JJ., dissent.

WRIGHT, J., dissenting. Because I believe that appellant's inculpatory statement to Cincinnati homicide investigators at the Broward County, Florida, jail was the product of an unconstitutional interrogation, initiated by police after appellant had invoked his right to counsel, I must respectfully dissent.

I

The relevant facts in this case are as follows:

Florida police officers arrested appellant on the morning of April 1, 1985, and took him to the police station in Oakland Park, Florida. Appellant was advised of his rights, acknowledging his understanding of each right after it was read to him. Detective Kenneth Perry of the Oakland Park Police Department asked appellant "if he wished to make a statement without an attorney present." Appellant agreed, then paused and said, "Maybe I should have an attorney." The Florida officers then stopped the interrogation.

Officer William Davis and Specialist Kerry Rowland of the Cincinnati Police Department arrived at the jail about 9:20 p.m. and asked that appellant be brought to an interview room. Appellant did not yet have counsel. When appellant entered the room, the officers identified themselves and told appellant that they were aware appellant was waiving extradition and that they were taking him back to Cincinnati. Officer Davis then told appellant that he

and Rowland "had a lot to talk to him about." Davis said that he had been in contact with appellant's mother. Davis told appellant that the officers could not talk to him unless he wanted to talk to them. According to Davis, appellant told the officers that he had spoken with his mother, who had advised him to tell the truth, and that he wanted to make a statement. Appellant then made a recorded statement in which he admitted killing and robbing David Self. Appellant's statement concerning the robbery is the only probative evidence of this aggravating circumstance.

The majority opinion and the state suggest that appellant told his mother to inform the Cincinnati police that appellant was ready to talk. THE RECORD DOES NOT SHOW THAT APPELLANT TOLD HIS MOTHER THIS AND THE TRIAL COURT MADE NO SUCH FINDING. In fact, at a hearing on a motion to suppress, this exchange took place:

"Q. Okay. And it's your testimony today that he [defendant] didn't call or *he didn't have anybody call you* and say to come to the jail when you arrived in Ft. Lauderdale, that he wanted to talk with you?

"A. [Officer Davis] That's correct." (Emphasis added).

Later in the hearing on cross-examination of Davis by the state, this exchange occurred:

"Q. And was it your testimony that when you approached Mr. VanHook you had indicated to him you were not going to interrogate him because

he had previously requested a lawyer? Did you tell Mr. VanHook that?"

"A. No, I did not.

"Q. How did that exactly happen then?

"A. I advised Mr. VanHook that we had a lot to talk about, and that we could not talk to him unless he himself wanted to make a statement. And he at that point indicated he had talked to his mother, and that she had told him just to tell the truth, and he wanted to make a statement.

"Q. And immediately after Mr. VanHook indicated that to you did you provide him with the Miranda warning --

"A. Yes, sir.

"Q. - and the reason -. Had you had communication with Mr. VanHook's mother before going to Florida?

"A. Yes, sir.

"Q. And, had she indicated to you that she had talked to Mr. VanHook?

"A. She had.

"Q. And did she indicate to you anything that Mr. VanHook had told her?

"MR. MATHEWS [Defense Counsel]: To which I object.

"THE COURT: Objection will be sustained.

"Q. After speaking with Mrs. VanHook, did you think that Robert VanHook might want to talk to you?

"MR. MATHEWS: To which I object.

"THE COURT: Overruled. You may answer that.

"A. Yes, I did.

"Q. And why was that?

"MR. MATHEWS: To which I object.

"THE COURT: Just a moment. Objection overruled.

"A. She had told me -

"THE COURT: Just a moment, sir.

"A. I'm sorry.

"THE COURT: My apologies. I *sustained* the objection rather than overruled [it]. Pardon me." (Emphasis added.)

For whatever reason, the court excluded the content of this conversation despite the fact that hearsay is admissible in a suppression hearing. Evid. R. 101(C)(l) and 104(A). Because the state made no proffer, whatever appellant's mother told Officer Davis is not in the record, and thus not before us.

From these facts, it is this court's duty to determine whether the interrogation by Cincinnati police was improper and whether the derivative confession should have been suppressed.

II

The starting point of any analysis into custodial interrogation is *Edwards v. Arizona* (1981), 451 U.S. 477. In that case, the Supreme Court held

at 484-485 that a suspect who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

The prophylactic rule of the *Edwards* case came as a corollary to the rule stated in *Miranda v. Arizona* (1966), 384 U.S. 436, 474, that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." In such an instance, the Supreme Court has concluded that "[i]f the interrogation continues without the presence of an attorney and a statement is taken, *a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.*" (Emphasis added.) *Id.* at 475.

In *Edwards*, the Supreme Court held that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards, supra*, at 485. The court concluded that reinterrogation may only occur if "the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*

The significance of the invocation of the right to counsel is premised in part on a lawyer's "unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare v. Michael C.* (1979), 442 U.S. 707,719. As Justice

White accurately stated in his concurrence in *Michigan v. Mosley* (1975), 423 U.S. 96, 110, fn. 2:

"[T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism."

III

It is undisputed that appellant invoked his right to counsel in the case at bar. Thus, the only issues in dispute are whether appellant (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. *Edwards, supra*, 485, 486, fn. 9; *Smith v. Illinois* (1984), 469 U.S. 91, 98. For the reasons set forth below, I believe it is obvious that the state has failed to prove that appellant initiated further discussions with police. Indeed, the record requires a contrary finding. Therefore, the court of appeals' affirmance of the death penalty in this case is faulty and must be reversed.

A

Despite the inadequate record in this case, the appellate court believed that appellant had told his mother to tell police that he was ready to talk. This

belief is borne out in the court's statement that "since the Cincinnati police had information that * * * [appellant] now wanted to talk, they were also entitled to determine whether that information was correct."

Although there seems to be no reason why a defendant in custody could not initiate contact with the police through a third party, the record simply does not reflect that appellant did so. Indeed, Officer Davis testified that neither the defendant nor anyone else called him to say that the defendant wanted to initiate further discussions. Therefore, Davis' statement that he and appellant "had a lot to talk about" initiated a "generalized discussion about the investigation" with appellant. *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 1045-1046.

In *Wyrick v. Fields* (1982), 459 U.S. 42, 46, the Supreme Court explained the *Edwards* rule as holding that a suspect in custody cannot be subjected to further interrogation after he requests an attorney "unless the suspect himself initiates dialogue with the authorities." There is not a scintilla of evidence in the record to show that the appellant initiated further discussion. The court justifies its holding by drawing one inference from another. It infers that the appellant initiated further discussion from the inference about what appellant's mother supposedly stated to Officer Davis. This is guesswork about facts which are not in the record. Such inference building undermines the constitutional foundations upon which *Bradshaw*, *Fields* and *Edwards*, *supra*, are built.

As stated above, a "heavy burden" rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. In *Bradshaw, supra*, at 1044, the plurality opinion stated:

"But even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel,' is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation."

To establish a waiver, it would be a "*necessary fact* that the accused, not the police, reopened the dialogue with the authorities." (Emphasis added.) *Edwards, supra*, at 486, fn. 9. As the court in *Arizona v. Roberson* (1988), 486 U.S. __, 100 L. Ed. 2d 704, 108 S. Ct. 2093, recently pointed out, if a suspect believes that he is not capable of undergoing custodial interrogation without the advice of counsel, "then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Id.* at __, 100 L. Ed. 2d at 713, 108 S. Ct. at 2097-2098.

I think it is obvious that the state has failed to meet the burden of proof required under *Edwards* and its progeny and has otherwise failed to rebut the presumption that the waiver was the product of

"inherently compelling pressures." Therefore, appellant's confession should have been suppressed.

B

The court of appeals based its decision to affirm in part on the fact that *Edwards* is factually distinguishable from the instant case because the police officers who interrogated appellant the second time came from a different department than those who conducted the initial interrogation. The court below stated:

"In *Edwards*, officers of the *same* department initiated a compulsive [*sic*] discussion about the offense, after the prisoner said he did not want to talk to them. He was told he had to do so. In the instant case, the second conversation with the prisoner was begun by an entirely separate police department. Cincinnati police officers came to the place of custody for the purpose of taking Van Hook back to Cincinnati to face the charges of murder. This was their first contact with him. * * *" (Emphasis *sic.*)

In *Arizona v. Roberson*, *supra*, at __, 100 L. Ed. 2d at 717, 108 S. Ct. 2101, the Supreme Court specifically rejected this distinction:

"* * * [*W*]*e attach no significance to the fact that the officer who conducted the second interrogation did not know that the respondent had made a request for counsel.* In addition to the fact that Edwards focuses on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must

enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. * * * [W]hether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists. The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer." (Emphasis added and footnote omitted.)

C

The court of appeals also based its affirmance in part on the premise that the *Edwards* rule is not a "who said what first" *per se* rule. The appellate court applied a balancing test to determine whether the interrogation was impermissible: "The right of a person in custody to be free of impermissible compulsion or deception must be weighed against the need for reasonably efficient and aggressive law enforcement." Such a test is clearly erroneous in light of the clear, bright-line rule emphasized by the Supreme Court in *Edwards* and its progeny. See *Michigan v. Jackson* (1986), 475 U.S. 625, 634; *Smith v. Illinois*, *supra*; *Solem v. Stumes* (1984), 465 U.S. 638, 646; see, also, *Shea v. Louisiana* (1985), 470 U.S. 51; *Oregon v. Bradshaw*, *supra*, at 1044.

In *Fare*, *supra*, the Supreme Court explained that the "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney * * * has the virtue of informing the police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances

statements obtained during such interrogation are not admissible." *Id.* at 718. Recently, the court stated in *Roberson, supra,* at__, 100 L. Ed. 2d at 714, 108 S. Ct. at 2098: "Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with police through counsel, he 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication * * *.' [*Edwards, supra,*] 451 U.S., at 484-485 * * *." See, also, *Bradshaw, supra,* at 1044-1045.

If the above language and the aforementioned cases do not demonstrate that *Edwards* established a *per se* rule, *i.e.*, that police may not initiate a conversation on the subject of an investigation after the accused requests counsel, I do not know what does.

The appellate court erroneously relied on *Bradshaw, supra,* to support its conclusion. In *Bradshaw,* a five-to-four majority of the Supreme Court reversed a state court decision which had held that the accused did not "initiate" a conversation with police. In that case, after asking for an attorney, the accused, without provocation, asked police officers, "Well, what is going to happen to me now?" A plurality of the Supreme Court found that this was sufficient to constitute an "initiation" by the accused under *Edwards.* The four dissenting justices would require the initiation by the accused to be "*about the subject matter of the criminal investigation.*" (Emphasis *sic.*) *Bradshaw, supra,* at 1053. In the instant case, however, no probative

evidence was ever offered to show that the accused initiated the interrogation. Without any evidence of such initiation, Davis' statement to appellant that the officers "had a lot to talk to him about" initiated a conversation on the subject of an investigation and led to an impermissible interrogation under *Edwards*.

IV

Therefore, for the foregoing reasons, I would reverse the court of appeals and remand the cause to the trial court for a new trial.

H. BROWN, J., concurs in the foregoing dissenting opinion.

Appendix

"Homicide of David Self
(February, 1985)

"STATEMENT OF
ROBERT VAN HOOK

"Code to persons speaking in statement:

"Q. Police Officer Bill Davis, Cincinnati Police Homicide Squad

"QQ. Specialist Kerry Rowland, Cincinnati Police Homicide Squad

"A. Robert Van Hook

"Q. This is Police Officer William Davis an' Specialist Kerry Rowland of the Cincinnati Homicide Unit. Today's date is 4-1-85, the time is 9:55 P.M. We're here at the Broward County Jail, uh that's in Ft. Lauderdale, Florida an' the following will be a

taped statement from Robert Van Hooks [*sic*], Jr., whose date of birth is 1-14-60, is that correct. Bob?

"A. Yes

"Q. An' this statement will be in regards to the homicide of one David Self, which took place on the night of 2-18-85. Before we go into this, Bob, I in front of, I have in front of me uh Division of Police Notification of Rights form. These rights were read to you out loud an' you read 'em along with me, is that correct?

"A. Yes

"Q. An' jus' for the record, I'm gonna go over 'em for ya, okay. Before we ask you any questions you must understand your rights. You understand that?

"A. Yes sir.

"Q. You have the right to remain silent. You understand that?

"A. Yes

"Q. Anything you say can be used against you in court. Do you understand that?

"A. Yes

"Q. You have the right to talk to uh lawyer for advice before we ask you any questions an' to have him with you during questioning.

"A. Yes

"Q. You cannot afford a lawyer one will be appointed for you before any questioning if you wish. You understand that?

"A. Yes

"Q. If you decide to answer questions now without a lawyer present you'll still have the right to stop answerin' at anytime. You also have the right to stop answering at anytime until you talk to uh lawyer. You understand that?

"A. Yes

"Q. An' this bottom part is uh Waiver of Rights. I have read this statement of my rights. I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time but understand and know what I'm doing. No promises or threats have been made to me and no pressure or coercion, which means force, of any kind have [*sic*] been used against me. You understand that?

"A. Yes

"Q. Okay, I have on the bottom here a signatures [*sic*] of Robert Van Hook signed 9:38. Uh is this your signature?

"A. Right.

"Q. Okay. And uh you do wanna make uh statement. Is that correct?

"A. Yes

"Q. An' I understand that you were arrested today at approximately what time?

"A. 10:50 this morning.

"Q. Okay, an' as you were being booked, you were given your rights by Sgt., I believe, Perry

"A. Yes

"Q. Okay, an' I also understand at that time you indicated to him that you wanted to make uh statement but that you wanted to confer with a lawyer first.

"A. Right.

"Q. Okay. But you have since changed your mind. Is that correct?

"A. Yes

"Q. Okay, an' this is being done of your own free will, correct?

"A. Yes sir.

"Q. Okay. Nobody's used any force, no coercion of any kind against you to make a statement?

"A. No

"Q. Can you explain why you changed your mind?

"A. Uh, I talked to my Mom today an' she jus' told me, you know, be cooperative an' jus' tell the truth.

"Q. An' that's when you, you, did you say you're waivin' your rights to an attorney at this time, after talkin' to your Mom[?]

"A. Right.

"Q. Okay. Why don't you tell Detective Kerry, Kerry Rowland an' myself what happened. Would you start from the beginning of that day, like

when you got up. An' we're talkin' about the day of February the 18th of '85. Is that correct?

"A. Uh huh, yes

"QQ. It was on Presiden'ts [*sic*] Day, that'll help ya remember, you know

"A. Yeah

"QQ. more people were off work, the businesses were closed.

"A. Uh I don' remember everything that happened that day, matter-of-fact, I don't remember most of what happened that day except what I had in mind that night an' that was to go down into the Subway, uh homosexual bar in downtown Cincinnati, an' my objective was to lure a homosexual uh to whatever place I would with intentions to rob the person an' so we uh, I met this guy an' I lured 'im on

"Q. Where'd you meet him at?

"A. At the Subway an' I lured 'im on an' uh as if I were gonna have, you know, sex with 'im an' he went, I took 'im in my car to uh his apartment where I uh, we entered the apartment an' I went over an' had uh seat in his living room an' turned on the stereo an' he started undressing an' he came over to me an' I had my penis out an' he leaned down to, suck my penis an' then, then I grabbed him in uh strangle hold I learned when I was in the service, anyway, throwed 'im down until he stopped breathing an' then I don' know what come over me

"Q Where'd it take place at, uh, Bob?

"A. This is in his apartment.

"Q. You recall what room?

"A. This is in the living room.

"Q, Is that where the TV's at or where the couch is at?

"A. It was by the stereo

"Q. Okay

"A. An'

"Q. You say you held 'im down?

"A. Yeah, until he stopped breathing. I don' know if I broke his neck or not but that's what I was tryin' to do, an' I don' know why, something, I don' know it's like somethin' possessed me, I jus' wanted to try all these techniques of killin' somebody that I learned in the service an' TV an' so forth an' jus' went berserk. An' I went into the kitchen, I left him lying on the floor an' I looked for uh knife. I found uh paring knife. I went back into the living room an' I stabbed 'im behind the ear lobe. It's uh passage into the brain an' I uh, it's called the scramblin', scrambler technique.

"Q. An' you learned that in the service?

"A. Yes, an', an', uh, I stuck the knife in the back of his head an' I started twistin' it. Then I tried to stab 'im in the neck an' I tried to cut his head off but it didn't, it wasn't working too well. I jus' wanted to see more blood, you know, cut his stomach open. I was tryin' to work my way through his stomach an' into the heart. I wanted to, I wanted to see what it, what he looked like with blood squirtin' out of it an' uh I proceeded to cut his stomach open, well that was

after I cut his stomach open. Then I threw the knife in his stomach when I cut it an', I – an' I got frightened an' I went into the bedroom after I searched him an' couldn't find any money, it's then I uh wen' an' got in the jewelry box an' pulled out some gold chains. Then I took his leather jacket an' went to the door but it was locked from the inside, I couldn' get it open an' I started gettin' paranoid so I went into the kitchen an' found uh butter knife, somethin' I opened it, opened the door an' I shut it an' before I left the apartment I made sure the stereo was playin' an' uh I got in my car an', I was scared an' I had blood all over my shirt an' I went to uh friend's house

"Q. Who, whose uh house did you go to?

"A. Uh Doctor uh Robert Hoy an' uh I told 'im that I had got in uh fight with my stepfather that's why I had the blood all over my shirt.

"Q. Where does Dr. Hoy live at?

"A. He lives in uh - I think Ft. Thomas in uh retirement center.

"Q. Okay, you told 'im you had uh fight with your father?

"A. I told 'im I got in uh fight with my father an' that

"Q. –

"A. that's why I had the blood all over my shirt an' he gave me some money. I told him I had to get out of town. He gave me thirty dollars an' fed me an' I left. I drove all night an' part of the next day an' I stopped fifty miles north of Chattanooga. I ran

out of gas an' I didn' have no more money for gas so I abandoned my car on the highway an' I

"Q. This is, what highway was that, huh?

"A. 75, so

"Q. Jus' left the car on the highway?

"A. On the side of the emergency lane an' I left the leather jacket in it that was his an' I took the bloody shirt off that I had on. I looked back in the car an' I had another shirt in the back I put on. I started hitch hiking. I got down here the next day an' I wen' straight to the gay bar I use to hustle at when I was uh teenage an' then I uh, I met this one guy an' he took me home an' let me stay with him for about uh week an' then I got uh job an' then uh the people I was riding to work with I uh ended up staying with them, but they weren't you know, they weren't homosexual or anything, they were straight. An' I, I worked until the person that I was driving to work with his car broke down an' then I, about the las' two weeks I been goin' down to the main strip an' bout once uh week I'd go down there an' lure uh homosexual to the room an' uh, I'd, an' I didn' try an' kill nobody down here but I uh assulted [*sic*] uh couple guys, took their money.

"Q. In the last couple weeks? Did, have you hurt anybody down here?

"A. No, no I haven't hurt nobody.

"Q. Okay. Well let's go back, okay, to Cincinnati on the 18th when you left home an' your intentions were to go to the Subway an' to roll a homosexual?

"A. Lure uh, yeah, roll uh homosexual.

"Q. Uh huh, have you done this before in Cincinnati that is?

"A. No, I never rolled nobody before in my life

"Q. Okay, did you approach the victim or did the victim approach you in the bar?

"A. I was sittin' next to 'im an' he started conversing an' uh he started talkin' an' I was tellin' 'im how, you know, I was expensive an' that if he didn' have no money he couldn't have no sex an' he

"Q. Uh huh, did he proposition you or did you proposition him? Or did he, did it even occur that way?

"A. No, then I jus' told 'im I was expensive an' that, you now, I was lookin' for somebody to take care of me but that I had expensive tastes an' he would have to have uh lot of money.

"Q. What did he say?

"A. I don', I don' know, I can't quite remember. But anyway we uh ended up goin' to his place an' I had in mind that I was jus' gonna knock 'im out an' take his money but

"Q. So you got to the place, the first thing you did, you say he sat down on this chair an' he was in the process of changin' his clothes?

"A. He was in the process of taking his clothes off.

"Q. Takin' 'im off. Okay, you, you had your penis out?

"A. 'yeah

"Q. Did you take it out or did he take it out?

"A. Uhh, I took it out

"Q. Uh huh, an' was this, was this to lure him over to you?

"A. Yes

"Q. Okay, then once over to you he started to go down on you an' that's when you grabbed him in the uh headlock?

"A. Yes

"Q. An' you think you broke his neck?

"A. That's what I tried to do.

"Q. Okay, an' did you, di' you punch 'im or slap 'im or anything?

"A. No, I jus', you know he bent down I jus' grabbed 'im real fast an' twisted his neck an' I

"Q. Threw 'im, threw 'im to the floor?

"A. I throwed 'im on the floor until he stopped breathin' an' then I don' know what came over me.

"QQ. you said he'd first turned the stereo up loud or somethin'?

"A. It wasn't loud, I jus', he [*sic*] was already on he turned it on it was one of the first things he did when he was in the apartment.

"Q. Then did you, after he was, was he unconscious then or was he dead, do you believe when you uh

"A. He.

"Q. went to get uh knife?

"A. he was unconscious. He was kind uh like makin' this weird like (makes choking sound) sound.

"Q. Uh huh. Where's the first place you cut 'im at ?

"A. I believe the ear in the brain.

"Q. An' this was that scrambling technique that you learned? An' how'd you learn this?

"A. When I was goin' through hand to hand combat training an' uh knife attack an' defense techniques.

"Q. Special Forces?

"A. They were, I was trained by Special Forces Specialists

"Q. An' where did this take place at?

"A. In Butcher's Garden [*sic*] in Germany

"Q. That was when

"A. '78, '79

"Q. Okay, you said that wasn't working, is that correct?

"A. What, scrambler?

"Q. Usin' scrambler technique.

"A. Wasn't working?

"Q. Yeah, you said, you said it, it didn't work?

"A. It must of worked (laughs) when

"Q. But you said you went back to get another knife

"A. No, after I, after he was unconscious I went into the kitchen an' I looked for uh knife an' I think I found uh knife. I uh scrambled his brain an' I started, I was stabbin' his neck an' I was tryin' to cut his head off but it wasn't cuttin' very good so I went back in the kitchen an' looked for uh knife, another knife an' I couldn't find one so I jus' kept usin' the paring knife.

"Q. Now, okay, that's where I was confused. Okay.

"A. So I went back out an' I started cuttin' 'im some more.

"QQ. Where was this now that you were cutting him more, in the stomach?

"A. I think I, yeah, I guess when I uh I cut his stomach open an' I pushed my hand an' knife up into the, I was trying' to poke the heart, stab the heart cause I wanted to see the blood squirtin' from the heart all over the place.

"Q. But then you s [*sic*], then you said you went into the bedroom to the jewelry box?

"A. Yeah, after I threw the knife. I put the knife down in his stomach, I

"Q. Did you search 'im for any money before you did that, before you went to the jewelry box?

"A. I searched 'im for money right after I had 'im down, after I

"Q. Uh huh did you

"A. choked 'im.

"Q. find any money?

"A. No, I think that's what might uh been what made me go berserk (laughs) you know.

"Q. But what all did you take out of the jewelry box?

"A. He had some gold chains an' some –

"QQ. How many gold chains did " – did you take?

"A. I don' know, s [*sic*], there's uh bunch of 'em all wadded up, together.

"Q. What did you do with 'em?

"A. Well, I uh, took the leather jacket he had an' the jewelry an' I went to the door an' it was locked from the inside an' I couldn't get out so I took uh butter knife an' I uh opened the door from the inside an' I, the next day I jus', an' well when I ran out of gas. I didn', I was scared an' I didn' wanna get pulled over hitch hikin' an' had that stuff on me so I threw it away.

"QQ. Threw everything away then?

"A. Jus' the jewelry. I left the leather jacket, it was too little for me an' I left it in my car.

"Q. Okay, an' that car's, was abandoned about fifty miles north of Chattanooga on 75?

"A. Yes

"Q. Okay then you came down here an' you met up with uh few people an' this is where you've been since.

"A. Yeah

"Q. Okay. Uh,

"QQ. How come you stuck the knife back in his stomach was it any special reason?

"A. Well I figured all the blood that was there cover up any fingerprints that I left on the knife an' I went back in the kitchen where I'd seen I left fingerprints looking for the second knife an' I kind uh smeared 'im an' I went in the refrigerator an' I's tryin' to find somethin' to eat but I didn' see nothin' I liked, so I shut the door.

"QQ. Well you jus', did you wipe your fingerprints off the refrigerator or anything?

"A. All's I know is I, I seen where I left fingermarks in the blood so I jus' kind uh smeared it

"QQ. So nobody'd know, you know it was your fingerprints?

"A. Yeah

"Q. When you left the apartment did you see anybody?

"A. I seen one guy but he didn't seem to be payin' any attention to me -

"Q. Well, where'd that take place at?

"A. Where'd what?

"Q. Where did you see this guy at?

"A. Down in the, by the garage area where they keep the cars in the parking area.

"Q. Okay. Is there anything else you'd like to say before we turn this recorded [*sic*] off?

"A. I can jus' say you know, I don't know what even possessed me to, to do somethin' like that, you know, even on drugs an' alcohol I usually, I can maintain my senses pretty well.

"Q. Okay, then, I'd like to reiterate the fact that this statement's been given of your own free will. Is that correct?

"A. Yes

"Q. Nobody's pressured you into giving this statement?

"A. No

"Q. Okay, uh an' you do understand your constitutional rights.

"A. Yes sir

"Q. Okay. Well this will conclude this statement given by one Robert Van Hooks [*sic*]. The end.

"Transcribed by Gale Ravenscraft
"Criminal Investigation Section
"April 4, 1985"

APPENDIX L

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CASE No. B-851389

STATE OF OHIO

Plaintiff

-vs-

ROBERT VANHOOK

Defendant

OPINION

3 JUDGE PANEL
JUDGE ROBERT S. KRAFT
JUDGE GILBERT BETTMAN and
JUDGE DONALD L. SCHOTT

8-8-85

BACKGROUND

This case originated with the filing of an indictment on April 18, 1985, against the defendant, Robert Vanhook, charging him with Aggravated Murder in Count One (1) of the indictment and charging him with one specification of aggravating circumstances as to Count One (1) thus qualifying this case as a possible death penalty case under the laws of the State of Ohio. In addition the defendant was charged with aggravated robbery in Count (2).

This opinion deals only with the aggravated murder charge and the specification pertaining to said murder. It is prepared and will be filed with the First District Court of Appeals and with the

Supreme Court of Ohio in compliance with the requirements of O.R.C. §2929.03(F).

On April 23, 1985, the defendant was present in court with his attorneys and was initially arraigned. The arraignment proceeding as well as all further matters in this case were handled by Judge Robert S. Kraft of the Hamilton County Common Pleas Court.

Since the date of arraignment the docket sheet reflects an extensive process of trial preparation. It also reflects a plea of not guilty by reason of insanity and the evaluations of professionals appointed by the Court. Numerous motions were filed before trial. They were heard and ruled upon during the course of the pretrial preparation. All rulings on said motions are reflected either on the docket sheet of the case, directly on the face of the motion or on the record.

GUILT OR INNOCENCE TRIAL

The guilt or innocence trial of the defendant, Robert Vanhook, commenced on July 15, 1985, after the defendant waived his right to a jury trial and elected to be tried by a three judge panel. Two special venire of seventy-five (75) each had already been drawn and summoned and early excuse requests had been attended to on July 9, 1985. Approximately one hundred twenty remaining prospective jurors were on hand on the day set for trial when the defendant elected to be tried by a three judge panel.

On July 15, 1985, the State commenced its case by producing evidence on the charge of Aggravated Murder as set forth in the First Count of

the indictment, evidence as to the specification of aggravating circumstances as to the first count, and evidence on the charges of aggravated robbery as charged in the second count.

During the course of the guilt or innocence proceeding, the State of Ohio and the defense presented witnesses. The thrust of the State's case was designed to prove the elements of the aggravated murder Count as well as the elements of the specification alleged. The thrust of the defense case was to present the defense of not guilty by reason of insanity.

From the evidence adduced there was absolutely no doubt that Robert Vanhook was the sole perpetrator of the murder. In a voluntary taped interview while in police custody he admitted killing David Self and he acknowledged that no one else was present. The disputed questions the three judge panel had to determine was whether or not he committed or attempted to commit the aggravated robbery alleged and whether or not he was insane at the time of the commission of the homicide.

After a review of the evidence including the exhibits and the arguments of counsel as they pertain to both the plea of not guilty and the plea of not guilty by reason of insanity and, upon due deliberation, the three judge panel did, on July 29, 1985, find the defendant guilty of aggravated murder as charged in the First Count of the indictment, and also found the defendant guilty of the specification contained in the indictment as it pertained to the first count.

The aggravating circumstance which the defendant, Robert Vanhook, was found guilty of committing was that as principal and sole perpetrator he committed said aggravated murder:

(1) While committing aggravated robbery.

SENTENCING PROCEEDINGS

On July 31, 1985, after a two day break in the proceedings which was necessary in order to have prepared and filed both a mental examination and a presentence report, as requested by the defendant, the second stage of this matter, hereinafter referred to as the Sentencing or Mitigating Proceedings commenced, pursuant to O.R.C. §2929.03(D).

It should be noted that the three Judges were not sequestered for their deliberations on guilt or innocence or during the two day break in the proceedings.

At the sentencing or mitigation proceeding the Court reversed the traditional trial procedure ordering defendant to open first and present his evidence first, while allowing the State to have two closing arguments. This partial reversal of procedure did not, in any way, alter the burden of proof placed upon the State, as the law requires. The three judge panel heard additional testimony, an unsworn statement by defendant and the arguments of respective counsel relative to the factors in favor of and in mitigation of the sentence of death. The Court then recessed the case until August 8, 1985.

Upon due deliberation, the three judge panel on August 8, 1985, found, unanimously, that the State of Ohio proved by proof beyond a reasonable

doubt that the aggravating circumstance which the defendant Robert Vanhook was found guilty of committing was sufficient to outweigh the mitigating factors in this case. Consequently the three judge panel decided that the sentence of death be imposed as mandated by the provisions of O.R.C. §2929.03(D)(2).

IMPOSITION OF SENTENCE PROCEEDINGS

On August 8, 1985, the three judge panel proceeded to impose sentence pursuant to O.R.C. §2929.03(D)(3). On that same date, the three judge panel filed its written opinion in the case as required by O.R.C. §2929.03(F).

This three judge panel found by proof beyond a reasonable doubt, upon a review of the relevant evidence in both proceedings, the testimony, exhibits, statement of the defendant, not under oath, arguments of respective counsel, along with the presentence report and mental examination report requested by defendant, that the aggravating circumstance which the defendant, Robert Vanhook, was found guilty of committing did outweigh the mitigating factors in the case and, therefore, on August 8, 1985, this three judge panel imposed the sentence of death upon the defendant, Robert Vanhook, ordering said execution to take place on December 19, 1985.

OPINION

The provisions of O.R.C. §2929.03(F) now require this three judge panel to state in a separate opinion its specific findings as to the existence of any of the mitigating factors specifically enumerated in

O.R.C. §2929.04(B) or the existence of any other mitigating factors, and also requires the three judge panel to state reasons why the aggravating circumstances that the offender was found guilty of committing were sufficient to outweigh the mitigating factors, since that is what the three judge panel has in fact found by imposing the death penalty. In other words the three judge panel must put in writing the justification for their sentence.

In meeting their responsibility under the statute, the three judge panel reviewed all mitigating factors described in O.R.C. §2929.04(B) as well as any other mitigating factors raised by the defendant and now indicates what conclusions were reached from the evidence as to each. Those possible mitigating factors specifically set forth in the statute are as follows:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death, and

(8) The nature and circumstances of the offense, the history, character and background of the offender.

The three judge panel will first, however, review the aggravating circumstances which the defendant has been found guilty of committing and will indicate the reasons for their conclusions.

AGGRAVATING CIRCUMSTANCES

The aggravating circumstance that the defendant, Robert Vanhook, was found guilty of committing was that the aggravated murder was committed while Robert Vanhook was committing aggravated robbery, and the said Robert Vanhook was the principal offender in the commission of the aggravated murder at the time the aggravated robbery was committed.

In deliberating upon their decision in this case as required by O.R.C. §2929.03(D)(3), the three judge panel evaluated all of the relevant evidence raised at both proceedings, the testimony, other evidence, the unsworn statement of the defendant and the arguments of respective counsel along with the presentence report and mental examination report requested by defendant.

The principles of law which guided this three judge panel are contained in written jury instructions which would have been provided to a jury during the two proceedings. The evidence and testimony was tested by the three judge panel from the viewpoint of credibility and relevancy to the existence of an aggravating circumstance along with its qualitative and quantitative measure. The crime of aggravated robbery was deemed by the General Assembly of the State of Ohio to be among the most serious when a general revision of the Criminal code was made on January 1, 1974. This crime separately stated is a first degree felony. In O.R.C. §2929.04, the General Assembly mandated the imposition of the death penalty for an aggravated murder committed during commission of this offense.

In the guilt or innocence proceeding, at which defendant did not testify and in the sentencing proceeding, in which the defendant did make an unsworn statement along with statements of defense of counsel in argument, there was never a denial in any respect that the defendant was the sole and principal perpetrator of the offense charged in the first count of the indictment. A complete review of the evidence pertaining to count one and the specification of the aggravating circumstance as to count one reveals to this three judge panel beyond any doubt that the murder was committed by the defendant and by he alone.

Furthermore, the three judge panel concludes that the defendant's version of the events in his taped confession establishes beyond any doubt that his intentions were crystal clear on February 18,

1985, when he made the acquaintance of David Self in the Subway Bar. His intention from beginning to end was to rob the victim at some point in their evening's activities. The evidence also establishes beyond a reasonable doubt that the defendant choked the victim into unconsciousness, and searched the victim for valuables; finding none, he became enraged. Furthermore, it is beyond any doubt that at some point in time the defendant went to the kitchen, took a knife from a drawer and commenced mutilating the victim's body in a most bizarre way. This part of his conduct that evening would have to be considered irrational. However, everything else he did that evening would have to be considered completely rational.

His modus operandi was clear. Since the age of fifteen he had been accousting and robbing homosexuals and he was intending to do the same thing again.

His efforts at concealment in smudging his bloody fingerprints and stuffing the knife handle first into the stomach wound were quite lucid acts and his visit to his friend Dr. Hoy for food and money were the acts of a totally rational person, his departure from the city and the discarding of stolen necklaces and a leather jacket, were obvious rational acts designed to avoid detection.

It was, therefore, the three judge panel's conclusion upon a full and complete review of all of the relevant evidence that there was proof beyond a reasonable doubt that the defendant committed an aggravated robbery; and that he killed David Self while committing that aggravated robbery. There

was also a plea of not guilty by reason of insanity entered and on this issue evidence was presented. The defendant called upon Dr. Emmett George Cooper and the State called upon Drs. Nancy Schmittgoessling and Teresito Alquizola.

Their testimony collectively established that the defendant had a personality disorder which was neither a mental disease nor mental illness and that the defendant could and did distinguish between right and wrong on the night in question. Furthermore, they concluded that much of what the defendant did on the night in question confirmed their own conclusions that he knew what he was doing and could have desisted from doing what he did. However, there was evidence to suggest that while under voluntary intoxication it was possible that the defendant lost touch with reality for some unspecified period of time while he mutilated the body of the victim, David Self, and while he acted out conduct he claimed was part of his military training and the influences of either his Viet Nam connections or movies he had seen about the Viet Nam War.

The three judge panel considered this version of the testimony of the event provided to the three doctors by the defendant and compared this version with the one provided in the defendant's taped confession and recognized discrepancies sufficient to cause the three judge panel to conclude that the defendant was attempting to weave a story which might cause the three judge panel to conclude that he was not in control of his faculties at the time he committed this heinous act. Considering the legal

definition of the plea of not guilty by reason of insanity and weighing the more credible evidence against the requirement of the law, the three judge panel concluded that the defendant failed to meet his burden of proof necessary to establish insanity at the time of the crime and therefore rejected this defense.

MITIGATING FACTORS

The three judge panel will now review all possible mitigating factors indicating whether or not they were present and if so what, if any, consideration the Court gave to them. Those listed in O.R.C. §2929.04(B) are as follows:

(1) "Whether the victim of the offense induced or facilitated it." The three judge panel finds absolutely no evidence whatsoever to suggest that David Self in any respect induced or facilitated the offense. This factor was not present.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation." Again, the three judge panel finds absolutely no evidence that would suggest that the defendant was under duress, coercion or strong provocation. This factor was not present.

(3) "Wherefore, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." The three judge panel finds absolutely no evidence that would suggest that the defendant suffered from a mental disease or defect.

(4) "The youth of the offender." The three judge panel finds that the defendant was born January 14, 1960, and at the time of this trial was 25 years of age. There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present.

(5) "The offender's lack of a significant history of prior criminal convictions and delinquent adjudications." The record in this case, including the exhibits offered by the defense and the testimony which the three judge panel has considered indicates that the defendant, Robert Vanhook, had numerous contacts with the law both as a juvenile and as an adult extending over a period of 14 years. Therefore the three judge panel would be precluded from giving the defendant consideration pursuant to mitigating factor number five.

(6) "If the offender was a participant in the offense but not the principal offender the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim." The three judge panel finds in this case that there was absolutely no evidence to suggest that any other person was involved in the aggravated robbery and murder of David Self, other than the defendant, Robert Vanhook. Therefore, this factor was not present.

In summary, based upon the relevant evidence presented, possible mitigating factors number one, two, three, four, five and six, described in O.R.C. §2929.04(B) were not present, and could not be the

subject of any consideration by this three judge panel as it relates to mitigation of the penalty of death.

The three judge panel will now review the remaining possible mitigating factors enumerated in O.R.C. Section 2929.04(B).

(7) "Any other factors that are relevant to the issue of whether the offender should be sentenced to death," and

(8) "The nature and circumstances of the offense, the history, character and background of the offender."

The history, character and background of the defendant and "any other factors that are relevant to the issue or whether the offender should be sentenced to death" are closely interrelated and will be reviewed as interrelated.

The nature and circumstances of this offense appear clear to the three judge panel. Therefore, it will not be the panel's intention to reiterate in this opinion each and every sordid detail of the afternoon and early evening hours preceding the death of David Self. The testimony of police officers, criminalists and deputy coroner who came upon the scene in the apartment of David Self, at 2475 Madison Rd., Apt. 26, Hamilton County, Ohio, revealed a gruesome scenario. It is quite clear that David Self was found on the floor of his apartment, blood splattered everywhere, with innumerable knife wounds about his body. In a gaping stomach wound was the knife that was used to bring about his death.

In the words of the defendant, on a taped statement to the police, the only living witness to the

incident, he related what happened that evening. The victim, David Self, kneeled in front of the defendant to perform an oral sexual act. They were in close proximity and the defendant grabbed and choked the victim into unconsciousness. Finding no money on the victim incensed the defendant. He got a paring knife from the kitchen and in an act of rage cut his throat four or five times and stuck the knife into the victim's skull behind the ears repeatedly to "scramble" the brains; then he cut a gaping wound in the victim's stomach, stuck the knife into the stomach cavity and attempted to cut the heart, without complete success. The defendant's version of the events has differed from that which he gave in his taped confession and that given to the three doctors. The true circumstances of the offense must be gleaned from the testimony of the State's witnesses who described the scene, the victim's condition, the condition of the apartment which was viewed by the three judge panel and the actions of the defendant immediately before and immediately after the attack.

The history, character and background of the defendant, Robert Vanhook, are very closely interrelated with the remaining mitigating factors to be discussed and will be interspersed with a discussion of these specific factors argued in mitigation.

The three judge panel have specifically reviewed the evidence offered regarding the background of the defendant. It seems unnecessary in this opinion to repeat all of the pertinent factors of his background that may have impacted upon his

conduct. The three judge panel is well aware that all of the evidence will be a part of the record that will be reviewed by the appellate courts and therefore will simply summarize what it deems to be some pertinent aspects of this defendant's history and background.

While the three judge panel recognizes that all of the records in this case indeed indicate the defendant had a very tragic and unfortunate upbringing, with no love or parental guidance, with continual and excessive use of alcohol and other drugs and with constant negative reinforcement of his personality, the three judge panel is also satisfied that the records, testimony and evidence, reflect conclusively that the defendant has never suffered from a mental disease or defect which would have prevented the defendant from distinguishing right from wrong or would have prevented him from conforming his conduct to the requirements of the law. In other words the defendant has never suffered from any psychosis. Instead, he has been diagnosed over many years as having a borderline personality disorder which manifests itself in all types of antisocial behavior. This disorder is not a product of a mental illness or disease, so says the overwhelming weight of the professional testimony.

It is true, that the defendant was afflicted with deficiencies of personality which suggested that he was destined to get into trouble. However, those same personality characteristics which allowed him to live and work within a community and society in a peaceful fashion when he chose to, compels this Court to a conclusion that the defendant functioned

as a rational human being during the period of time surrounding the criminal activity of which he has been convicted.

This is not to say that the defendant was a totally normal human being. Time and time again professionals diagnosed him as having problems; of being a problem; of showing little motivation. He manifested a passivity which at times could be deceiving. But throughout his life, his true personality reflected a desire to do his thing whenever he wished, regardless of the consequences.

In considering whether or not the defendant, at the time of committing the offense because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, the three judge panel reviewed the expert testimony of Drs. Emmett Cooper, Nancy Schmidtgoessling and Teresito Alquizola and the mental examination report of Dr. Donna E. Winter. Their collective and lengthy testimony and reports offer credible and compelling testimony in the case with respect to the sanity of the defendant. They all characterized the defendant as not having a mental disease or illness and not being psychotic. They all found the defendant to have personality problems and classified him in the lexicon of the profession as being a borderline personality which was not due to any mental illness or disease.

As an example, Dr. Nancy Schmidtgoessling, a clinical psychologist, found that the actions of Mr. Vanhook were classical for a borderline personality. She pointed out that the defendant has admitted

what he had done, and has had complete and total recall of the incident even to the extent of saying that he did intend to rob his victim and that he got angry because he did not find any money on the victim. He also described in much detail his efforts at covering up his presence and his escape, clearly showing complete touch with reality at all times. Dr. Schmidtgoessling in describing the defendant as having a borderline personality disorder stated, however, that he was not mentally ill even though she did see disturbance of functioning in some of his conduct. She acknowledged that while Mr. Vanhook may have been out of control at the time of his attack on David Self, and his ability to refrain from the act may have been seriously impaired at that moment, that inability to refrain was not the result of mental illness or mental disease or mental defect. It was the result of being angry, one of the characteristics of a borderline personality disorder and this anger was precipitated by failure to find money and by the enhancement of his voluntary ingestion of alcohol and other drugs of abuse.

Dr. Teresito Alquizola, a psychiatrist, said that he felt the defendant had a character disorder but that he was aware of what he was doing; was aware of the intentions of his actions; that he did not have a mental disease or defect, he did have the capacity to know the wrongfulness of his contact and if there were another person in the room at the time he would have been able to refrain.

Dr. Emmett Cooper, a psychiatrist, called by the defendant reached much the same conclusion concerning the nature of the defendant's problems.

His medical conclusion was that the defendant was not suffering from a mental defect or illness at the time of the event which would have prevented him from conforming his conduct to the law or from knowing the difference between right or wrong. However, he concluded that the defendant did have a borderline personality and because of a voluntary ingestion of alcohol and or drugs suffered a transient psychotic episode during which he was not in touch with reality.

The three judge panel concluded that there was no evidence that the offender in this case, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. In arriving at this conclusion it should be noted that the three judge panel recognized and considered the testimony of Dr. Emmett Cooper who was called as a defense expert witness. Upon careful examination of Dr. Cooper's testimony this three judge panel is satisfied that when rendering his opinion in this case, he was careful to walk a very fine professional line. He was willing to acknowledge a similar diagnosis as his other professional colleagues, that is a borderline personality disorder, but sought to go further in suggesting that the ingestion of alcohol and or other drugs of abuse caused the defendant to lose touch with reality. Although he didn't verbalize it in exactly this fashion, he was want to suggest that a form of temporary insanity situation occurred. The three judge panel chose not to accept this theory to explain the defendant's bizarre conduct.

The three judge panel now moves to a discussion and examination of any other factor that may be relevant to the issue of whether the defendant should be spared from a sentence of death. The intelligence of the defendant, Robert Vanhook, has never been questioned by either side in this case. It is readily apparent that the defendant functioned in a normal range for his age. It was clear that his earlier years were chaotic and he suffered from a significant degree of neglect and abuse. But this fact alone certainly cannot excuse his conduct. The defendant from about the age of fifteen has been involved in a sordid life style and has been a parasite on society praying on homosexuals for a livelihood. It is also recognized that the defendant is drug and alcohol dependent.

The three judge panel recognize that the death penalty is the most severe penalty that can be imposed by man against man and that it should only be imposed after a most careful and meticulous review of the facts and law have taken place. It is believed that such an evaluation of the facts and law in this case had been undertaken by this three judge panel in reaching their decision.

CONCLUSION

The sole issue which confronted the three judge panel is stated as follows:

> DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCE WHICH THE DEFENDANT, ROBERT VANHOOK, WAS FOUND GUILTY OF COMMITTING

OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard all of the statutory mitigating circumstances and all other possible mitigating factors raised by counsel have now been reviewed and discussed. The same has been done with the aggravating circumstance.

Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the three judge panel's attention by defense counsel in any manner and after considering fully the aggravating circumstance which exist and has been proven beyond a reasonable doubt, the three judge panel concludes that the aggravating circumstance does outweigh all the mitigating factors advanced by defendant beyond a reasonable doubt as required by O.R.C. §2929.03(D)(3).

For all the above stated reasons the three judge panel did impose a sentence of death.

Respectfully submitted,

s/ROBERT S. KRAFT, JUDGE

s/GILBERT BETTMAN, JUDGE

s/DONALD L. SCHOTT, JUDGE

APPENDIX M

TRIAL TESTIMONY OF ROBERT VAN HOOK, SR.

[585]

* * *

ROBERT VAN HOOK

being first duly sworn, was examined and testified as follows:

THE COURT: All right. Sir, we'll ask you to state your name, please.

THE WITNESS: Robert VanHook.

THE COURT: And what is your home address, sir?

THE WITNESS: 4211 Allendorf Drive.

THE COURT: What city is that?

THE WITNESS: Cincinnati.

THE COURT: Now, sir, there is a video camera in the courtroom and you have a right not to be photographed while you're testifying. What is your pleasure, sir?

THE WITNESS: It doesn't make any difference.

THE COURT: You'll have to tell me whether you do or do not.

[586] THE WITNESS: It's all right.

THE COURT: You don't mind it?

THE WITNESS: No.

THE COURT: All right. Then the record will reflect the witness has no objection to being photographed while he testifies.

You may proceed, Mr. Bell.

DIRECT EXAMINATION
BY MR. BELL:

Q. Sir, please state your full name.

A. Robert VanHook.

Q. And how old are you, sir?

A. Forty-nine.

Q. And where are you currently employed?

A. Plainville Concrete.

Q. Are you presently working there?

A. Yes, sir.

Q. Sir, directing your attention to the man in the second seat in the blue coat, who is that?

A. That is my son.

Q. Is that your natural son?

A. Yes, sir.

Q. Sir, when and where was he born?

A. Cincinnati, January 1970 (*sic*), I think.

[587] Q. Now, sir, just very briefly, would you describe his first two years for us, please?

A. Pardon?

Q. Would you describe your son's first two years of life and your home situation at the time?

A. The first two years, I was living with his mother, and we drank a lot. I played music, and – well, he didn't know nothing then. He was too young.

Q. What kind of music did you play?

A. Rock and roll.

Q. And?

A. Everything.

Q. And what was the relationship between you and your wife at that time?

A. It was fair.

Q. Was there intermittent --

A. Up and down.

Q. Was there intermittent circumstances of violence?

A. Yeah.

Q. And what would those entail?

A. I slapped her a couple of times, got arrested. I thought she was cheating on me.

Q. During Robert's first five years of life, what was his family situation like?

[588] A. He heard a lot of arguments, was tossed here and there, he went with her, then he went with me, and we was always fighting.

Q. Was that physical as well?

A. Physical as well.

Q. Was that in the presence of Robert?

A. Yes, sir.

Q. Were you both heavy drinkers at that point?

A. Yes, sir.

Q. Were you also taking drugs?

A. Yes, sir.

Q. What kind?

A. Speed, not too much; marijuana, occasionally; and alcohol.

Q. And when did you and his mother, Joyce, separate the first time?

A. I don't remember.

Q. Do you know how old he was?

A. I would say about five, six.

Q. And did you get back together after that?

A. Yeah. We went back together two or three times, I think.

Q. And where would Robert be each time? [589] Who would he go with?

A. Every time we'd split up, he'd usually wind up with me.

Q. And what kind of a lifestyle was that when he would end up with you?

A. Babysitters, I'd come home drunk from playing music all night, lay in bed with a hangover every day, didn't give him much attention.

Q. When you would come home and have these hangovers, who would be taking care of Robert?

A. Nobody.

Q. And what age was he during this?

A. I'd say nine, ten, eight.

Q. And how often would this occur that you'd be drunk and hung over and that sort of thing?

A. About every night of the week when I played music.

Q. And how long would these periods that he was with you last?

A. Three, four months, five months. It's according to how long I played music.

Q. How often were you playing music during this time?

A. About five, six nights a week.

Q. Now, did you start to take Robert to [590] these various bars you were playing in?

A. Yes, sir, I took him in bars. I couldn't find babysitters.

Q. What age was that?

A. Ten, nine.

Q. And how long would he stay in these bars?

A. He would stay as long as I played. I'd put him in the back room and let him go to sleep or he'd have to sleep in a booth.

Q. Sleep in a booth at the bar?

A. Yes, sir.

Q. And how late would you stay at these places?

A. 3 o'clock, 4 o'clock in the mornings.

Q. How often a week would you take him?

A. Whenever I couldn't find a babysitter, maybe once or twice a week.

Q. And would you get drunk during these periods?

A. Yes, sir.

Q. Now, what age did you start to share alcohol and drugs with your son?

A. I imagine he was around 12, 11.

Q. Eleven or twelve?

[591] A. Yes, sir.

Q. And what kind of alcohol did you give him?

A. Beer, booze, we'd take speed together, smoke –

Q. Now, when you say speed, sir, what do you mean?

A. Pills.

Q. Amphetamines?

A. Uppers. Yeah, they're uppers.

Q. How old was he when you began giving him speed?

A. About eleven.

Q. How often would you drink with him when he was eleven?

A. Occasionally, not too much.

Q. When you'd play music?

A. Yes, sir.

Q. And how often would you give him amphetamines?

A. The same, just when – maybe once a week or something like that, on weekends.

Q. Would he actually, at age eleven, get intoxicated with you?

A. Yes.

[592] Q. What? You mean falling down drunk?

A. We both would.

Q. At age eleven?

A. Yeah.

Q. And how long did he stay with you from that period during eleven and twelve?

A. I don't really remember offhand.

Q. Now, during that period, were you arrested periodically?

A. Let's see. I was arrested quite a bit from drinking.

Q- And what were the arrests for?

A. Mostly assault and batteries.

Q. Barroom fights?

A. Barroom fights.

Q. Was there an incident, sir, where you took a pistol in and shot up a bar?

A. Yes, sir.

Q. And what happened on that?

A. I got thirty days in the Workhouse, - five years' probation. I also had a felony charge on me.

Q. What age was Robert when that happened?

A. It's been about thirteen, fourteen years ago.

[593] Q. So he's twenty-five now; that would make him around eleven or twelve?

A. Yeah.

Q. And when you got arrested that night, who took care of Robert?

A. We was out – back with his mother then.

Q. So this was a period when you were back with Joyce?

A. Yeah.

Q. So she took care of him?

A. Yes.

Q. What was her situation like during this period when you were back with her?

A. She drank a lot, too. She was a bartender. I don't know. We just went back and forth, moved back and forth together and bust up, move back, and bust up.

Q. Did she – I'm sorry. I didn't want to interrupt.

A. One time I got in a fight with her and he ran out the door crying. And also I lived with another woman after we busted up, got divorced, and her and I didn't get along. She was jealous of Bobby, and we got in fights. He run out the door [594] crying then.

Q. So up till Bobby was eleven, there'd be periods where he'd be with you and periods where he was

with his mother and periods when he would be with both of you?

A. Yes, sir.

Q. And this went from what? When he was five to eleven?

A. Well, after the divorce, he was older than that.

Q. How old was he when you got divorced?

A. I really don't remember.

Q. Twelve or thirteen? Or you don't know?

A. I'd say, sir.

Q. Now, at that point, was he still going with you?

A. Yeah, I think so.

Q. When you got divorced, who did he live with?

A. Lived with me.

Q. Were you still playing music?

A. Yes.

Q. So when he was thirteen, were you still drinking with him?

A. Yes.

[595] Q. Were you still taking drugs with him?

A. Yes.

Q. And how often were you doing that?

A. Weekends mainly.

Q. And you'd give these to him?

A. Yes. I learned him to play drums, and I wanted him to play music with me.

Q. And did he start to play music with you?

A. Yes.

Q. How old was he when he started playing at these bars?

A. I think he was about fifteen.

Q. And what time would you usually be done at these bars?

A. 4 o'clock, 3 o'clock.

Q. Now, was he trying to go to school during this period as well?

A. Yes.

Q. So he'd get home at 3 or 4 o'clock, after doing drugs with you, and then he'd try to go to school?

A. Yeah.

Q. Did he miss a lot of school?

A. He didn't miss a whole lot, but he [596] didn't have too good of grades.

Q. He had a lot of trouble in school?

A. Yeah.

Q. Now, Mr. VanHook, you moved down to Florida at some point. Is that correct?

A. Right.

Q. How old was Robert then?

A. I don't remember.

Q. Fourteen, fifteen?

A. I'd say so.

Q. Now, what were you doing at that point down there?

A. Playing music.

Q. Was Robert enrolled in school?

A. Yes.

Q. Now, there was an incident in which he actually left your house for a couple of months?

A. That was the second time.

Q. Did you move back the first time from Florida?

A. Yeah, we came back to Cincinnati.

Q. And who was he living with then?

A. Me.

Q. And were you still living the same type of life style?

[597] A. Yeah.

Q. Still drinking every day and doing drugs and that type of thing?

A. Yeah.

Q. When did you go back down to Florida?

A. I think it was a year after I brought him back. I'm not sure.

Q. So he'd be about fifteen?

A. I think so.

Q. And how long were you down in Florida the second time?

A. About three months.

Q. And where did you actually live?

A. I was living with a woman in Pine Keys.

Q. Where did Robert live in Pine Keys?

A. With me.

Q. In the same room?

A. Trailer.

Q. And there was an incident there that caused Robert to leave; is that correct?

A. Right. I got drunk and come in and accused him of going to bed with my girlfriend.

Q. And that's when he was fifteen?

A. Yes.

Q. What did he do at that point?

[598] A. He – the next day I didn't see him. He took off, and that was it.

Q. And how many months was he on his own on the Florida streets?

A. I don't know. I imagine about two or three or four, something like that.

Q. Two, three, four months?

A. (Indicate yes.)

Q. Did you ever try to find him?

A. Well, he – he went through his sister's, his step sister's. That's how I found out where he was.

Q. And where was that?

A. I talked to the police down there. I went to Key West. They didn't know where he was.

Q. Where was his stepsister?

A. In Alabama.

Q. And that was after the point where he left you?

A. Right.

Q. You don't know how long he was on his own?

A. No.

Q. When did he next come back to live with you?

[599] A. He came back – well, I sent him the money to get back from Alabama.

Q. When was that?

A. That's when I was married to the wife I have now.

Q. So you left the woman in Florida, you met another woman, and you married her?

A. Right.

Q. How old was Robert when that happened?

A. I don't know.

Q. Sixteen, seventeen?

A. We've been married nine years, ten years.

Q. So if Robert is twenty-five, that would make him fifteen or sixteen years?

A. Right. I'm separated from her now.

Q. And how long did Robert live with you and her?

A. I'd say about a year.

Q. And how did that go?

A. No good.

Q. Why was that?

A. She was jealous of him.

Q. And what kind of problems did she have with him?

[600] A. She – she never had no problems with him. She was jealous of him and I.

Q. Why was that?

A. She didn't want me to give him no affection. Bobby never did get any love. He was a good boy. He never got mistreated, except for one time that I had to hit him, but he didn't get the love that he should've.

Q. During that period when he lived with you and your wife, at that point did he go back and forth between you and his mother again?

A. Yes, and also to her sister's.

Q. So, also, during that year, he lived with her sister Marilyn?

A. Right.

Q. And then he'd come back to you?

A. Right.

Q. Now, when he'd come back with you, would he still play music with you?

A. No. I quit when I got married this last time, I think.

Q. Would you still go drinking together?

A. Yeah.

Q. Would you still do drugs together?

A. No, I don't think we – I think we [601] smoked some grass.

Q. But you didn't do the pills any more after he was sixteen?

A. No.

Q. Now, during this time you said there was an incident where you hit him. Could you tell us a little bit about that?

A. That's when I was – he was living with me, just him and I. And he had some boys up in the apartment. They was drinking a little bit, and the landlady called me. I was at work, and I had to take off work. And I went home, and I told the boys to get out, and he was going to go with them. I told him to stay there, and I slapped the hell out of him.

Q. I'm sorry. Go ahead.

A. And then he run out the door, and he run over in the cemetery. I don't know where he went, but the cops caught him in the cemetery screaming and hollering and banging his head on a tree, and then they called me over to the police station and they let me listen to him over the innercom, and he was in a rage. I couldn't do nothing with him.

Q. Did he actually have to be shackled and arrested?

[602] A. Almost.

Q. And was that the first time he had been arrested that you know?

A. He had been arrested, I think, for drinking, disorderly conduct.

Q. No. I mean before that incident at sixteen?

A. No, just minor things, I think it was, like playing hookey and stuff like that.

Q. Now, after the period sixteen to seventeen, who did Robert live with then?

A. I think he lived with my wife and I, and at seventeen he went in the service.

Q. And had you previously been in the service?

A. Yes.

Q. Were you in the service during the Korean War?

A. Yes, sir.

Q. And then Robert enlisted at seventeen?

A. Right. I talked him into it.

Q. And you signed the waiver so he could get in the service?

A. I did.

Q. Now, he was in the service for five [603] years; is that correct?

A. Yes. He did real good for awhile.

Q. And what kind of contact did you have with him during that five years?

A. Not much at all, just when he come home.

Q. How often would that be a year?

A. Once a year.

Q. So during the five years he was in the service you saw him once a year?

A. Right.

Q. Now, when he would come home, would you still go out drinking with him?

A. Yes.

Q. So you were still an alcoholic at that point?

A. Right.

Q. Would you still do drugs with him?

A. I don't think we ever did drugs when he was home from the service.

Q. How did he do as far as you know the first couple years in the service?

A. Real good.

Q. In fact, he became an E-5, a sergeant, didn't he?

[604] A. Right.

Q. And when is the first time after that that you knew he was having trouble?

A. When he got to Germany.

Q. What happened there?

A. He was -- started hitting drugs.

Q. And would you see him periodically?

A. No. His mother went to see him in Germany, and his mother's husband's brother went over to see him.

Q. Now, his mother's husband's brother – what's his name?

A. Don.

Q. And is he a known homosexual?

A. Yes.

Q. And what was your feeling about Don seeing Robert in Germany at that point?

A. I don't like fags. I think their minds are warped.

Q. And had you expressed your opinion about, quotation marks, fags, as you call it, to Robert?

A. No. We never discussed that. He knew I didn't like'm.

Q. And what was the first time you noticed [605] he had a major problem in the service?

A. When his mother went over there.

Q. And what was the problem?

A. He just started hitting dope.

Q. Was this when he was using heroin?

A. Pardon me?

Q. Is this when he was using heroin?

A. I don't know what he was using over there.

Q. But he became addicted on drugs?

A. Right.

Q. Eventually he was discharged from the service?

A. Yes, sir.

Q. Now, this is – I guess, he's 21 at this point; is that right?

A. I think so.

Q. And where did he go to live?

A. When he came home?

A. Right.

Q. Well, I think he lived with his mother awhile, and then he lived with me awhile.

Q. When he lived with you, were you still with the same woman?

A. Right. He lived with his mother most of the time.

[606] Q. Why was that?

A. Because the woman I was married to was jealous of him. She didn't want me to have nothing to do with him, and she was jealous of his mother.

Q. I see. So she didn't like you to have contact with your son?

A. Right. She hated his mother.

Q. Was there an incident on Christmas Eve where Robert wanted to see you, wanted you to come over?

A. Yes, and she didn't want me to go see him.

Q. And what happened?

A. Well, he was drinking with my sister and her husband, at my mom's house, and they got all drunk together.

Q. Does your sister and her husband, do they have a drinking problem, too?

A. No, they was just in for a visit.

Q. O. K.

A. And they're alcoholics, and they got him all blammed up and left him alone and – you know, instead of keeping him with them.

Q. And this was Christmas Eve?

A. Right.

[607] Q. Go ahead.

A. And he called me and started crying and wanted to see me, and I was going to see him. And her and I got in a fight. So I stayed home. So he wound up getting all depressed and drunked up, went in the basement, my mom said, and she heard a dog barking down in the basement.

Q. Does she have a dog?

A. No.

Q. That was Robert?

A. Yeah.

Q. Go ahead.

A. So she goes downstairs and he's under –

MR. MOORHEAD: I'm going to object. This is all hearsay.

THE COURT: The objection will be sustained now.

BY MR. BELL:

Q. What injuries that you know of did Robert suffer as a result of this incident?

A. He went in the bathroom, he put his foot on the door, and pried hisself against the bathtub.

MR. MOORHEAD: Objection.

THE COURT: Objection sustained. The [608] last answer will be ordered stricken from the record.

BY MR. BELL:

Q. Mr. VanHook, I'm just asking you what the injuries were to his person.

A. All the way up his arm, a hundred and some stitches (indicating).

Q. He tried to cut his arm?

MR. MOORHEAD: Objection.

THE WITNESS: Tried to cut his arm.

THE COURT: The objection will be overruled. The answer will remain.

BY MR. BELL:

Q. What did you physically see on his arm?

A. He was in the hospital, and he was cut all the way up. He tried to kill hisself.

Q. Over a hundred stitches?

A. I think so.

Q. Now, after this incident and after he tried to kill himself and when he got out of the hospital, who did he live with then?

A. He went back with his mother.

Q. How old was he at this point?

A. I don't know.

Q. Twenty-two?

[609] A. I think so, something like that. That's when he got married.

Q. How, how long was he married?

A. Not very long.

Q. A couple of months?

A. I'd say.

Q. What kind of girl did he marry?

A. I can't give a good opinion of her. She was bad for him.

Q. How long did he know her before he got married?

A. I really don't know.

Q. And after he got divorced, where did he live then?

A. Back with his mother.

Q. Did he still periodically see you?

A. Once in awhile, his car would break down and something like this.

Q. Did he still go out drinking with you?

A. Yeah. We drank together, and I took him over to the job I had and broke him in on the concrete mixer. He turned out to be a real good driver but they laid him off.

Q. Now, during this time was there an incident when both you and your son got arrested?

[610] A. Right.

Q. And could you describe that for us?

A. Well, we was in a bar drinking, and I think I was the one started the fight, and he jumped in to help me. He heard me, I guess, and I slipped on the floor, and he was beating -- beating the one guy, and two women started beating him in the head with the bottle itself and knocked him out, and so I beat the hell out of the women, and we got arrested.

Q. Now, when you got arrested Robert was the one that actually got charged at that point; is that correct?

A. Both of us.

Q. Both of you. And did Robert go to the Workhouse for that?

A. No. He went through the drug program in the VA.

Q. Now, that was the drug program in the VA?

A. Yes, sir, and I went to the alcoholic.

Q. Did you go to the alcoholic program at the same time he went through the drug program?

A. Right.

Q. So you were both in the VA Hospital in separate wards?

[611] A. Right.

Q. Now, how long were you both in?

A. Pardon?

Q. How long were you both in the hospital?

A. I think he was in for ten days and I was in for thirty.

Q. Now, after you got out, did you start drinking again?

A. No, I haven't drank nothing since I've been in there.

Q. So that was the last time you drank?

A. It's been nine months.

Q. When was this that you both got arrested?

A. Nine months ago.

Q. And did Robert start drinking again?

A. I think so.

Q. So you didn't see Robert very much after that?

A. No.

Q. From the time you both got arrested in the VA program, when is the last time you saw him before he got arrested on this charge?

A. I don't remember.

Q. Did you see him many times once you got [612] out of the VA?

A. No. As matter of fact, I don't think I saw him at all since I got out of the VA.

Q. So that was the last time you saw him until he got arrested on this?

A. I think so.

MR. BELL: I have no further questions.

THE COURT: All right. Is there any cross-examination in behalf of the state at this time?

MR. MOORHEAD: Yes, your Honor.

CROSS-EXAMINATION

BY MR. MOORHEAD:

Q. Sir, the incident you talked about, you say that was nine months ago when you say your son got in a fight in a bar?

A. I think so. I'm not sure of the date.

Q. I think it maybe had to be a year and nine months ago, didn't it?

A. No.

Q. Go ahead. Give me your interpretation.

A. No, because it was Christmas when I got out.

Q. Christmas of 1984?

A. Yeah.

[613] Q. O.K. Well, Christmas being December of 1984; is that when you got out?

A. Right.

Q. So you think this happened in November of 1984?

A. Right.

Q. O.K. Your son's birthdate was January the 14th, 1960; is that correct?

A. Yeah, 1960.

Q. Before you testified it was 1970. In fact, it would have been 1960?

A. I'm a little nervous.

Q. I understand that. I just wanted to get that cleared up. So it was in 1960?

A. Yeah.

Q. You said something before that, in reference to – I think you used the term fags. What do you mean by that?

A. The homosexuals.

Q. Are you the one that taught your son how to lure homosexuals for the purpose of robbery?

A. No.

Q. Who did that?

A. Nobody.

Q. Nobody ever did that?

[614] A. (Indicate no.)

Q. Nobody taught him that?

A. No.

Q. When is the first time your son told you about homosexual contacts that he had?

A. We never discussed it.

Q. Did you know that he had a homosexual contacts?

A. No.

Q. Did you ever tell him your feeling about homosexuals?

A. I think I told him I didn't like him being around his mother's husband's brother.

Q. When did you tell him that?

A. I don't know, a couple years ago.

Q. Did you know that long before that he had been a male prostitute?

A. No.

Q. So you weren't aware of the sexual contacts he had had with other men?

A. No.

Q. You never discussed that with him?

A. No, sir.

Q. And he never told you about that?

A. No.

[615] MR. MOORHEAD: No further questions.

THE COURT: Any redirect?

MR. BELL: No, your Honor.

THE COURT: Do you want the witness subject to recall?

MR. BELL: No.

THE COURT: Sir, you're going to be excused and free to leave. You are instructed not to discuss the case with anyone except the attorneys or their staffs until the case is over. Do you understand that, sir?

THE WITNESS: Yes, sir.

THE COURT: All right. You're free to leave.

The witness is excused permanently.

(Witness excused.)

THE COURT: All right. Counsel, step up a moment moment, will you please?

(Discussion at the bench.)

THE COURT: We're going to stand in recess for the lunch hour now until 1:45 p.m.

(The case was continued in progress.)

* * *

APPENDIX N

TRIAL TESTIMONY OF JOYCE LAVERNE LAUTTRELL

[616]

* * *

AFTERNOON SESSION, JULY 31, 1985

THE COURT: All right. The record will show the defendant is present with counsel, and the state is represented.

Does the defendant have any other witnesses to offer at this time?

MR. BELL: Yes, your Honor. We'll call Joyce Lauttrell.

JOYCE LAVERNE LAUTTRELL

being first duly sworn, was examined and testified as follows:

THE COURT: All right. Will you please state your name?

THE WITNESS: Joyce Lauttrell.

THE COURT: Spell your last name, please.

THE WITNESS: L-a-u-t-t-r-e-l-l.

THE COURT: And your home address, please?

THE WITNESS: 4144 Crystalview Court, Sharonville.

THE COURT: Pardon?

THE WITNESS: Crystalview Court, Sharonville, Ohio.

THE COURT: All right. Miss Lauttrell, [617] there are cameras in the courtroom this afternoon, and you have the right not to be photographed while you are testifying.

What is your pleasure, please?

THE WITNESS: Not to be photographed.

THE COURT: All right. The record will reflect the witness has elected not to be photographed during the course of her testimony.

You may proceed, Mr. Bell.

DIRECT EXAMINATION

BY MR. BELL:

Q. Ma'am, please state your full name?

A. Joyce Laverne Lauttrell.

Q. How old are you?

A. Forty-eight.

Q. Where are you currently employed?

A. I'm not.

Q. Ma'am, are you presently under a doctor's care?

A. Yes, I am.

Q. Ma'am, directing your attention to the second seat to my left, the man in the blue jacket, who is that?

A. That is my son.

[618] Q. What's his name?

A. Robert Johnson VanHook.

Q. And when was he born?

A. January 14, 1960.

Q. Now, ma'am, at the time he was born, who were you married to?

A. Robert Jesse VanHook.

Q. And had you been married previously?

A. Yes, I had.

Q. How many times have you been married?

A. Four times, counting twice to my present husband.

Q. And did you have children from a previous marriage before you had Robert?

A. I did.

Q. And how many and what gender were they?

A. Two daughters.

Q. And how old were they when you had Robert?

A. Four and three.

Q. And how old were you when you had Robert?

A. Twenty-two – twenty-three, I'm sorry.

Q. And how long had you been married to Robert VanHook, Sr.?

[619] A. Approximately nine years.

Q. I mean before you had Robert?

A. Before I had Robert, two years, three years.

Q. Now, ma'am, how would you describe Robert's first five years of life?

A. They was pleasant and bad times.

Q. What do you mean by that?

A. Well, his father and I had a lot of problems, and I feel it had an effect on Robert because of some of the beatings that I had taken.

Q. Who gave you these beatings?

A. His father.

Q. And was this when he was drunk or sober?

A. Drunk.

Q. How often would these occur?

A. They happened mostly whenever he would bring drugs into the home and I would flush them down in the toilet.

Q. How often would that be?

A. Every week almost.

Q. What kind of drugs?

A. Speed – I don't really know. I never was introduced to drugs until I married him.

[620] Q. Were you drinking at this time as well?

A. Yes, I was.

Q. How often did he use to beat you?

A. At least once a week, maybe, every two weeks.

Q. Was that in the presence of Robert?

A. Yes, it was.

Q. Now, during those first five years, who did Robert live with?

A. He lived with me.

Q. And Robert VanHook, Sr.?

A. Right.

Q. Now, during those five years, did you work?

A. Yes. I was employed then.

Q. In what business?

A. I was a mixologist.

Q. Bartender?

A. Yes.

Q. What hours did you work?

A. I worked mostly nights.

Q. And were you drinking a lot during this period, too?

A. I was.

Q. Who would take care of Robert?

[621] A. I had different babysitters and my one sister and sister present here in the courtroom.

Q. Were there times when Robert would be left with a babysitter like two or three days at a time?

A. Yes, there was.

Q. And where were you during this time?

A. Drinking, confused.

Q. Where was your husband, Robert VanHook, Sr.?

A. Drinking.

Q. So you'd be on binges?

A. Right.

Q. Now, during the period from when Robert was five till he was ten years old, what was your life style like during that period?

A. I filed for divorce three times during that period, and the third time my attorney told me that it would not be able to go back in Court again, and I had to make a decision, and I was not raised in an alcoholic home, and I was very confused at this time, and I had to be under psychiatric care again, Doctor Warren Richards, and between him and my attorney they got me straightened out, and I went ahead with the divorce.

[622] Q. So you divorced Robert VanHook, Sr.

A. Right.

Q. How old was Robert when you did that?

A. He was nine or ten.

Q. Now, after the divorce and during the period when you got the psychiatric help and all that sort of thing, who was taking care of Robert?

A. He was living with his father, and then his aunt, my sister.

Q. Which aunt?

A. His Aunt Marilyn Johnson.

Q. So during this period, you had troubles and really didn't see him that much, I guess?

A. Yeah. I would see him maybe on weekends, you know, or something like that. Whenever he wanted to come home, he could come home at any time.

Q. Were you still drinking pretty heavy at that time?

A. Yes, I was.

Q. Were you an alcoholic?

A. Yes.

Q. Now, after you got divorced from the period that Robert was ten to fifteen, what was his life style like then?

[623] A. I had remarried to my present husband and Robert had moved to Florida with his father, and he was back and forth between his father and I, and we had bought a home and everything, and I had started getting my life together, and there were some problems with my present husband.

Q. And that's when you got divorced for the third time?

A. That's right.

Q. And where was Robert living during this time?

A. That I was divorced?

Q. Right.

A. When I was divorced – let see now. When I got divorced now, my husband – I'm sorry. He was in the service. He had just signed in the service.

Q. Robert had?

A. Uh-huh.

Q. So up till Robert was seventeen, you were still married to your third husband?

A. Right.

Q. Now, during that period of time, he lived between the two of you and some relatives?

A. Right.

[624] Q. How long would he stay at each place?

A. He couldn't be away from me no longer than three or four months at a time. He always had to come back home.

Q. Was he enrolled in a lot of different schools at this point?

A. Yes, he was.

Q. In other words, I assume when he was with you he would be in a different school than when he was with his father?

A. When he was with me, he was at that time enrolled in Princeton, and when he got back with his father he'd be like at Norwood.

Q. When he was with Marilyn, what school was that?

A. That was Little Miami in Morrow, Ohio.

Q. That was a different school district?

A. Right, different county.

Q. How long would he be in a different school district at a time?

A. Well, I can say the longest he was in one school at one time was when he was with his Aunt Marilyn in the Little Miami High School.

Q. And how long was that?

A. A year.

[625] Q. And that's the longest he was at any one place?

A. Yes.

Q. Or any one school?

A. Yes.

Q. Did you have any behaviorial problems with him between ten and fifteen?

A. There was things that I didn't know was going on between his father and him, and I know it was because Bobby was afraid to tell me, because he figured if he would tell me what was going on with his father, doing the drugs and that with him and the drinking and all this, that I would not let him go back, and probably afraid I would have something done to his father.

Q. So all the while he was ten years old, you didn't know he was doing drugs?

A. No I did not.

Q. And you didn't see him very often except on the weekends?

A. No.

Q. Now, between fifteen and seventeen, where did he live?

A. He lived with me mostly.

Q. Now, when he was down in Florida, do [626] you know anything about that?

A. No, not until he had called my husband. I was in the hospital with major surgery, and he asked my husband if he would send him a bus ticket, and my husband said yes, and he sent him a bus ticket that he couldn't cash and brought Bobby home and took him and bought him all new clothes and got him enrolled at Princeton High School, and here they came in the hospital, and I was shocked; I knew nothing about it.

Q. How old was he then?

A. He had to be around fifteen. It was a year or two before he went in the service.

Q. How long did he stay at that time when he came back and got new clothes and enrolled in Princeton and all that? How long did he stay with you?

A. About six, seven months.

Q. Where did he go?

A. Well, then, by that time he was old enough to quit school, and he went back with his father at Norwood, and that's when he quit school.

Q. And that was at what age?

A. Sixteen.

Q. Now, when did he join the service?

[627] A. He joined the service on his birthday, January 14th, when he was seventeen.

Q. If you know, why did he join the service?

A. This had always been his desire since he was a small child. He would see cowboys and Indians and soldiers, and always we would buy him army outfits and army men, and this was just his desire from such a small child.

Q. It was a big thing for him to go into the military?

A. That's right. That's all he lived for.

Q. Did you sign his papers or did his father do that so he could get in at seventeen?

A. His father, because I – if I would have known of his drug problem at that time, I wouldn't even have let his father sign.

Q. Did you still have an alcoholic problem at this time when he was seventeen?

A. Not like it was; nothing like it was, because I was getting myself together.

Q. Were you working at that time?

A. Yes, I was working at the Ramada Inn.

Q. Still a bartender?

A. Mixologist and cocktail waitress.

[628] Q. Now, ma'am, when he went into the service, how did that go?

A. It went fine. The first two and a half years was beautiful. He was in four and a half years, and I'd gone to see him in Germany. The first year he'd only been in training here in Georgia and then right away he wanted to go overseas. So he put in forth that. And he'd gone to Frankfort, which he was stationed at, and so the first Christmas he was there

I wanted to go be with him, and I did. That's when my present husband and I had gotten divorced, and I went over, and everything seemed to be fine with him. It wasn't till after I came back that – I was only back like two months, and they called and said he tried suicide and asked what I thought they could do for him.

MR. MOORHEAD: Objection, your Honor.

THE WITNESS: And I says –

THE COURT: Just one moment, please. The objection will be sustained now.

BY MR. BELL:

Q. Don't tell us what somebody else said, ma'am.

A. Oh, I'm sorry.

Q. Just tell us what happened.

[629] A. So, anyway, they put him up in the mountains. I thought that would be better for him in the mountains. And then he was over there two and a half years, and then he came home.

Q. Why did he come home, if you know?

A. Well, his time was up over there, and they sent him back to the United States, and then he got a thirty-day leave, and from Cincinnati they sent him on to Fort Hood, Texas, for a year.

Q. Was he eventually discharged from the army?

A. Yes, he was.

Q. Why was that?

A. Because of his alcohol and drug program – I mean problem.

Q. Now, during the point that he was in Germany, did your husband's brother visit him?

A. Yes, he did.

Q. And is your husband's brother a homosexual?

A. Yes, he is.

Q. And what were your feelings at that point? Did you know that there was a homosexual relationship between them?

A. Not at that time, I didn't.

[630] Q. After he was discharged from the army for alcohol and drugs, what was his reaction to all that?

A. He was very upset. He was very upset about it, and tried to re-enlist.

Q. When did he try to re-enlist?

A. He had to be out two years before he could re-enlist. So that was two years ago this past June he tried to get back in.

Q. Did he actually apply?

A. Yes, he did.

Q. What did he want to get into?

A. He wanted to get into the Green Berets.

Q. And was he able to re-enlist?

A. No, he wasn't.

Q. And why was that?

A. Because he had forged a hundred-dollar check when he was living with his ex-wife, and if it had been for $99.99, he could have re-enlisted.

Q. Was this important to him?

A. Very important.

Q. Did he try to enlist in any other services?

A. He was wanting to go into the French – French Army or French Revolution.

[631] Q. French Foreign Legion?

A. French foreign Legion.

Q. When did he try to get in there?

A. I talked him out of it.

Q. Was this the same time period?

A. Yes.

Q. After he came out of the service, who was he living with?

A. He was living with me for awhile.

Q. How long?

A. He's been living with me off and on since he's been out.

Q. Would he also live with his father?

A. Just maybe two, three weeks at a time.

Q. Would he also live with his aunt?

A. He went out there on visits, but, see, he had been married in that time, and it didn't work out, just for like five or six months, and he was back home.

Q. When did he get married?

A. It was about February of '83, maybe.

Q. How long did he know that girl before he married her?

A. Approximately seven, eight months.

Q. And what did you think of that girl?

[632] MR. MOORHEAD: Objection.

THE COURT: Objection overruled. She may answer.

BY MR. BELL:

Q. Go ahead.

A. I didn't like it at all. I just felt that she wasn't right for Bobby. She just wasn't up to our standards of living, and the Sharonville police – well, I can't say that.

Q. After he got divorced from her, where did he go then? Who did he live with?

A. He went back in with me. I took him after the divorce.

Q. Was there ever a point he was going to move in with some men?

A. Not that I know of.

Q. O.K. So you didn't really know that your son had any homosexual contacts or dealings or was involved in any way with any homosexuals at that point?

A. No.

Q. Did you eventually find out about that?

A. Yes.

Q. How was that?

A. He had told me about his uncle, my [633] husband's brother, and he says, "He wants me to be his lover, mother," and he says, "I can't. I just want him to be an uncle to me."

And I threatened – my present husband had treated him terribly and threw him out of the house, and Bobby wanted to become so close to him. He wouldn't let him. He was jealous of him.

Q. Who was jealous of him?

A. My present husband.

Q. And that was because this was his brother that was having a homosexual relationship with your son?

A. Right, and I told him – I said, "If you don't go to him and tell him about it, I'm going to, and we will end up with another divorce, because I'm tired of my son being hurt. I cannot have it no more."

Q. And what happened after that?

A. I told his brother off.

Q. And did his brother still have contact with Robert after that?

A. I told him I didn't ever want to see them together again, and I told Bobby he'd better not go up there again, and he did not until this last winter, and – I didn't even talk to his brother for [634] three months after this. I didn't want him nowhere around me. And so, then, this was last February a year ago, and I told my husband if he didn't like it that we would

go back to divorce court, but I was just sorry that he wasn't man enough to go to his own brother and tell him about this thing and that he was not going to abuse my son no more, either one of them, and so I –

Q. Go ahead.

A. So I didn't – I had no contact with his brother from February until last June, and then I had – he's an alcoholic and a homosexual, and I had to rush him to the hospital. And he's dying with cancer now, and so Bobby did help me take him a few times this past winter for his radiation treatment, but, other than that, there was no contact, no.

Q. Who was Bob living with the past year before this incident happened?

A. This past year?

Q. Right. In other words –

A. In the past year he's lived with me all but about three months, and that was last summer when he was living up at his grandmother's with his father.

Q. That's your grand –

[635]

A. Grandmother VanHook. My parents are both deceased.

Q. Ma'am, were you aware of some suicide incidents that your son was involved in?

A. Yes.

Q. And what were those?

A. He's tried slitting his wrists and cutting off his arms five times, and the first time – twice in the

service, and then he was out of the service six months. He was discharged in June, and the first Christmas home he had gone to his Grandmother VanHook's. He wanted to spend Christmas so bad with his father, but his father was all drunked up, and so his aunt and uncle had come in with two fifths of whiskey, and his uncle had some speed, and Bobby was supposed to be back at our home at 9 o'clock that evening so we could go to midnight services. Well, the next thing I know, I got a phone call at 1:30 Christmas Day morning –

Q. Just tell us what happened. What had happened?

A. They had rushed Bobby to the hospital.

Q. And what had happened to him?

A. His uncle had given him the speed, and he drank the whiskey, and he tried to cut his left [636] arm off, and they didn't know if they was going to be able to save it, and I was at the hospital all that Christmas Day, and then four months later he tried to cut the other arm.

Q. That's his right arm?

A. Yes.

Q. And what about the incidents of suicide after that?

A. It's just been – the next time was down at Central Station when he'd gotten on a high and tried to throw hisself through the plate-glass doors, and they picked him up on a Friday night, and they called me from the hospital Sunday and said he tried to slit his wrists at Central Station and they had him over there.

Q. Ma'am, was this the time at UC where he dried to run through four panels of glass?

A. That's right, sir.

Q. When he was arrested the next day, he tried to kill himself again?

A. At Central Station.

Q. And any other incidents after that?

A. The one day they brought my husband's brother back from the treatment and he was kind of upset, he took a bottle of his sleeping pills.

[637] Q. When was that?

A. Just this past January.

Q. That was a month before this present incident?

A. Yes.

Q. Ma'am, is there anything else that you want to add?

A. I just feel that his father and I – his father and I ought to be on trial with him. There's so much I wish I could take back.

THE COURT: Would you like to take as little water, ma'am?

THE WITNESS: So many things I wish I could do over again, but I can't, and I feel just as much to blame for what happened as he is. And I did quit drinking six years ago the twenty-seventh of this month, and I was going -- I've been in church and Bobby – he just gets so confused. He would go to church. As matter of fact, he was at church the night

before this happened. And I feel that he's not in this thing alone. He does have problems, and there's so much I wish I'd known sooner so I could have got him help, because Doctor Richards is a good psychiatrist, and, [638] had I only know, I'd have let him take care of him as well as take care of me.

BY MR. BELL:

Q. Did you try to get your son some psychiatric help?

A. I told them over at Veterans last year, when he was in the program, I didn't feel that the drug program was going to be enough for him, that he needed more.

Q. Was he able to get into any psychiatric program?

A. I'm sure they could have got him into something, I'm sure.

Q. But did he?

A. No.

MR. BELL: I have no further questions.

MR. MOORHEAD: No questions, your Honor.

THE COURT: No cross-examination?

MR. MOORHEAD: None, your Honor.

THE COURT: All right. Do you want the witness subject to recall?

MR. BELL: No, your Honor.

THE COURT: Mr. Moorhead?

MR. MOORHEAD: No recall, your Honor.

* * *

APPENDIX O

TRIAL TESTIMONY OF MARILYN JOHNSON

[639]

* * *

THE COURT: All right.

Now, ma'am, you're going to be excused now and you're going to be free to leave. We'll ask you not to talk to anyone about the case except the attorneys or their staffs until the case is over.

Do you understand that?

THE WITNESS: I do, your Honor.

THE COURT: All right. Thank you very much.

THE WITNESS: Thank you.

THE COURT: The witness is excused permanently and may leave.

(Witness excused.)

THE COURT: All right. Do you have another witness on behalf of the defendant?

MR. MATHEWS: Marilyn Johnson.

MARILYN JOHNSON

being first duly sworn, was examined and testified as follows:

THE COURT: All right. Ma'am, we're going to ask you to speak into the microphone and keep your voice loud and clear, please.

What is your name?

THE WITNESS: Marilyn Johnson.

[640] THE COURT: Spell your last name.

THE WITNESS: J-o-h-n-s-o-n.

THE COURT: Your home address?

THE WITNESS: 6197 Rossburg Road, Morrow, Ohio.

THE COURT: All right. Now, there's a video camera in the courtroom, and you have a right not to be photographed while your testimony is being given. What is your pleasure?

THE WITNESS: I wish not to be photographed.

THE COURT: All right. The record will reflect the witness does not want to be photographed while her testimony is being offered.

You may proceed, Mr. Mathews.

MR. MATHEWS: Thank you, your honor.

DIRECT EXAMINATION

BY MR. MATHEWS:

Q. Mrs. Johnson, what is your relationship with the defendant, Robert VanHook?

A. I'm his aunt; his second mother almost.

Q. What is your relationship to his natural mother?

[641] A. I'm – we're sisters.

Q. O.K. And have you known Robert since the time of his birth?

A. Yes, I have.

Q. Would you briefly describe for the judges what you know about Robert?

A. I went to live with my sister and Bobby's dad before – when my sister was pregnant, that's when I moved in with her for awhile, until – because I was working at McGregor's on Spring Grove, and they were living in Findlater Gardens, and Joyce was pregnant.

So I lived there off and on with her. After she had little Bobby, I took care of little Bobby and his two sisters whenever Bob and Joyce would go out. I had him most of the time whenever he was little.

Q. What sort of home life did he have when he was little while you were present?

A. He had a bad one, one that kids should never have, babies should never have to go through.

Q. What do you mean by that?

A. Well, Joyce and Bob fought an awful lot, drank an awful lot. One night in particular comes to mind. Bobby was just a couple months old, a few [642] months old. It was about 3 or 4 o'clock in the

morning, and we was in bed and we heard this awful noise, and little Bobby woke up, and Joyce came in and woke me up and asked me if I'd go down and get Bobby a bottle, and I said yeah, and I started down the steps.

And she said, 'Oh, Marilyn, wait a minute." She said, "Somebody's down there with Bob."

And I said O.K. And so she went down a little bit, and she came up and said, "Marilyn, they don't have any clothes on, and they're fighting and they're drunk."

And I said, "Joyce, I can't go down."

We could hear bottles and glass breaking, and I said, "Joyce, I can't go down."

And little Bobby starts crying, and he was hungry. And I said, "Well, Joyce, why don't you pick him up? And if you pick him up and hold him in your arms, he'll see you have Bobby and he won't hit you, he won't do anything because you got little Bobby with you."

And she went down and got his bottle, and I sat in there with her, and we took turns feeding him, trying to quiet him down.

[643] Q. How long did you live with them, young Bob, Bob Sr., and Joyce.

A. Oh, just a few months, because then they moved, and then after they moved, then I got married.

At first my husband thought that little Bobby was mine because I had him all the time, and whenever we would go out, he would cry and want to

go with me, and so we'd take him for a ride, you know, to get him settled down, and Joyce would say o.k, she'd put him to bed, and we'd go on.

So it took a little bit of convincing, you know, that little Bobby wasn't my son, that he was Joyce's, and, anyway, they moved, and I did get married, and there was still just fighting.

Joyce would move in with us because her and Bob would be fighting – Joyce, little Bobby, and he's got two half sisters, and she'd move in with us for awhile, for a few weeks, and Bob would come back, and they'd go back and get another apartment and then they had moved to Blanchester, and she had the two girls and little Bobby.

Q. When was this, approximately?

A. It was before he was a year old that they moved to Blanchester, because after Earl and I [644] got married, I was pregnant and my brother called, or somebody had called me, or my husband had talked to them, and they said, "You'd better come and get the kids because Joyce and Bob have both been drinking and been on a binge for a few days, and the kids are dirty and there's nothing for them to eat."

So my two brothers, or my brother-in-law and brother, I think, went up to Blanchester to get Bobby, and he was about a year old then, and my sister wouldn't let them have little Bobby, but they did bring the two girls back down to us.

Q. Did Bob live with you off and on throughout his early years?

A. Yes, after he brought – Joyce had told my brother just to take the two girls home, and that she would get things together. She was pretty – she had been drinking, and she was, you know, upset, because her and Bobby had been fighting, that they would bring little Bobby down to me the next day, which she did. I had little Bobby then for, I don't know, a couple of months, because she was running around, going to car races, and –

Q. How old was Bob at that time?

A. He was a year – let me see. There's a [645] year and a half difference between me and my – I had twins – between my children. So I guess he was almost a year old then whenever I got him.

Q. How long did he stay with you at that time?

A. He just stayed a couple of months, Joyce came home one night, and she was feeling real good, and she says, "If it's all right, I just want to stay here for a little while. I'm going to get an apartment."

And she went over to get little Bobby out of the bed, and he just had a fit. He didn't even know her, but he lived with me about two or three months then.

Q. Was there ever a period of time when he lived with you for a period of a year or so?

A. Yeah.

Q. When was that?

A. When he was in the fifth grade. He was about eleven years old.

Q. What brought that about?

A. Well, Bob and Joyce just was fighting, and they couldn't – you know, didn't have any place to put him. They couldn't keep him. They were running around drinking, just partying, and so they [646] asked if Bobby could come up and stay with us for awhile for the summer, and it went on.

Q. To your knowledge, had he been in any difficulties – meaning young Bob – prior to his coming to your house?

A. Was he ever a problem?

Q. Yes. Was he ever in any kind of trouble?

A. Not then.

Q. Either in school or with the law?

A. Not whenever we got him, when he come to live with us for school, never.

Q. And he spent a year in school and living with you; is that correct?

A. Yes. He lived with us, went to school. Mr. Bowman was his fifth grade teacher, and even today he asks about little Bobby, how's –

Q. What terminated his living at your house?

A. Well, Joyce and Bob wanted – Bob wanted him back. Bob wouldn't come up very often, but whenever he did, it would upset us, and little Bobby would come and little Bobby would say, "My dad said I could bring my drums to your house, and I can do whatever I want."

[647] I wouldn't want the drums, and it would take me awhile to get back to him. He was two different boys. He was one boy, and he would get

with his dad, and when he would come home, he'd be a little different boy, and it would take me awhile to get him straightened out. He would say, "My dad said I don't have to do anything you tell me to do. You're just a big phony and you just go to church."

And Bob would constantly have Bobby -- tell Bobby to put us down, and that wasn't Bobby, because he was good. He played sports at school. He had a horse. He loved his horse. We got a horse and pony for him, and he'd take care of that horse, and if my oldest son or if Earl wanted something done, he was like our oldest son.

Q. After he left at the end of that year, where did he next come to live with you again, if he ever did?

A. After the school year, he went back, and then he was just bounced from Joyce and Bob, living with his dad, and if things didn't go right he'd go live with his mom. He'd just come back out to the house off and on.

It was like, you know, he didn't want to lose contact with us. My mother lived with us [648] then, and that was a big factor. He would say, "Boy, Aunt Marilyn, I like to come out here because you cook so good and things are so different."

Last year was the first time that Bobby really come out and started spending a lot of time with us again.

Q. And do you know what precipitated that?

A. Well, let me see. I think he got into some trouble and he come back to Joyce's, and he just wanted to come out to the farm. He didn't have any job, and

my husband said, "Well, tell little Bobby to come on out to the house, and I'll pay him to help me," because we had some work to do out there. So then he would come out there.

Q. Did he live with you during that time?

A. Yes, he did. He'd stay with us.

Q. Was he living with you immediately prior to February 18th, 1985?

A. Yes, he was.

Q. O.K. And during what period of time was he living there with you?

A. Well, he was staying with us. He had been out to the house, I guess, for the last two weeks before this came up, before this happened.

[649] Q. Was he living there?

A. Yes. He would stay with us, and then my sister would say, "Tell Bobby to call me," or, "Tell Bobby to come home and just spend one night."

Well, he was working with us, and he liked it out there, and he talked to my husband a whole lot, and he told my husband a couple of times – and it upset my husband – he said they were out on the barn working and he said, "Boy, Uncle Earl," you know, he said, "I'm not jealous, but I'm so proud of Randy and Sandy and Tracy," and he said, "They just have everything in life I'd like to have."

Q. Those were your children?

A. Those were my children.

Q. Was he drinking at all when he was out at your place?

A. No. Bobby wouldn't even smoke in our house. We don't smoke, and he wouldn't even smoke, and it was cold, and we'd say, "Bobby, honey, that's all right. You can come in here and smoke." I don't have any ashtrays, but he said, "That's all right, Aunt Marilyn."

He'd go outside. So it was cold one day, and Earl or I, one, told him, Bobby, go in there and get something. Don't go outside."

[650] So he went into the garbage and got a can and put a little bit of water in it, and that was his ashtray. And things would come up with little Bobby. We'd sit around and talk pretty much, and I'd look at Bobby, and I'd say, "Bobby, tell me, is this really the truth?"

And he'd say, "Oh, Aunt Marilyn." And I'd say, "C'mon, you can tell me."

And whenever Bobby – he'll give you this little silly grin and sort of giggle, and you know that he's nervous, that he's not, you know, something is wrong, he's holding back.

Q. Did he seem to be having any problems, or did he express any problems that he was having to you right around the eighteenth of February?

A. He was just concerned because he'd get real nervous because he couldn't get a job. There wasn't – some jobs was coming opening, but they wasn't, you know, soon, but he was just working with his Uncle Earl.

Q. What was the last night he spent with you?

A. I took him home. He stayed all night Sunday night, and I took him home Monday morning.

Q. Do you know what the date was?

[651] A. No, I don't.

Q. And this is the Monday immediately preceding February 18th?

A. Yes.

Q. O.K. Did you have any contact with him after that?

A. No. After he – after I dropped him off Monday morning at his mother's, no, I didn't.

Q. And you haven't seen him – or you didn't see him until after he was brought back here to the Hamilton County Jail?

A. No.

MR. MATHEWS: Thank you. I don't have anything further.

MR. MOORHEAD: No questions.

THE COURT: No cross-examination.

Do you want the witness subject to recall?

MR. MATHEWS: No, your Honor.

THE COURT: State?

MR. MOORHEAD: No, your Honor.

THE COURT: All right. Ma'am, you're going to be excused with instructions not to

discuss the case with anyone except the attorneys or their staffs until the case is

* * *

APPENDIX P

COURT REPORT

CENTRAL PSYCHIATRIC CLINIC
COURT PSYCHIATRIC CENTER

222 E. Central Parkway - Lower Level
Cincinnati; Ohio 45202
(513) 352-3111

NAME Robert J. Van Hook

DATE OF BIRTH REDACTED

DOCKET NUMBER B85-1389

OFFENSE Aggravated Murder Aggravated Robbery

REFERRAL DATE 7/29/85

EVALUATION DATE 7/30/85

COURT DATE 7/31/85

The Honorable Robert S. Kraft
Hamilton County Court of Common Pleas
Cincinnati, Ohio

RE: MITIGATION

Dear Judge Kraft:

This is in response to your request that Robert J. Van Hook, who has been convicted of Aggravated Murder with Specifications, be evaluated with regard to mitigation of death penalty, pursuant to Ohio Revised Code 2947.06. Mr. Van Hook was evaluated,

by the undersigned, Donna E. Winter, Ph.D., Clinical Psychologist, in the Hamilton County Jail on July 30, 1985. Prior to evaluating Mr. Van Hook, I was able to review all material contained in Court Psychiatric Center charts on Mr. Van Hook. This material includes prior psychiatric evaluations; the results of psychological testing; information gathered from collateral sources such as Mr. Van Hook's relatives, the defense attorneys, the prosecutor, psychiatric services at the Community Correctional Institution; school records; records of prior psychiatric treatment; records from Municipal Court Probation; as well as an autobiographical statement made by Mr. Van Hook and a copy of his statement to the Cincinnati Homicide Squad in regard to the offense. The non-confidential nature of this evaluation was explained to Mr. Van Hook and he acknowledged understanding this. The following is a summary of my findings and conclusions.

On examination, Mr. Van Hook was oriented to reality and he was cooperative. While he was verbally spontaneous, his emotional expression was flat in that his face remained immobile and there was no show of emotion, either negative or positive. The client was logical and coherent throughout, exhibiting no symptoms of impaired or peculiar thought processes.

Evaluation of Mr. Van Hook, together with a review of all available historical material, indicates the following characteristics of his current and long-term functioning: Substance abuse, manipulation or consistent use of others for his own ends, intense anger, physically self-damaging acts such as suicidal

gestures and self-mutilation, chronic depression and disturbances in identity (e.g., gender identity). These characteristics are hallmarks of what is referred to as a borderline personality disorder.

The most salient aspect of borderline personality disorder is the presence of intense anger which can be discharged in a diffuse, primitive rage, resulting in bizarre acts of aggression and violence. This description is consonant with Robert Van Hook's behavior in the murder of David Self.

Development of a borderline personality disorder has its roots in events which occur before the age of three. Mr. Van Hook's background reveals a history of chaotic, violent and unstable family relationships. Prior to his mother's marriage to his natural father, she had been married and divorced and there were two older half-sisters. The mother's first marriage ended in divorce because her husband was abusive to her. The mother indicates that it turned out that Mr. Van Hook was equally abusive. Within two months of the marriage, Mr. Van Hook began "running around" with other women. He was a drug abuser (heroin and amphetamines) who was pathologically jealous of her. The client was born 11 months after the marriage, into a setting of marital chaos. When the father continued to abuse drugs, the mother began to drink heavily. When the client was six months old, the mother threw the father out and went on Welfare. The mother described the first year of Mr. Van Hook's life as difficult since she had three children to contend with, she had very little money and Mr. Van Hook was always sick, going from one infant illness to another.

When Mr. Van Hook was one year old, his mother met another man and would often go on out of town trips with him, leaving the client in the care of his aunt. After she broke up with this man, the client's mother returned to his father. In fact, although she filed for divorce three times before finally following through when Mr. Van Hook was nine years old, Mr. and Mr. Van Hook lived together, on and off, during that period of time. When his father was home, Mr. Van Hook observed numerous episodes of violence between his mother and father. Mrs. Van Hook described times when her husband would grab her by her hair and swing her around the room, hold her at gun point, hold her at knife point, etc. Since Mr. Van Hook slept in his parents' bed at times, he also observed sexual violence when both his parents were drunk. At times when the parents were separated and the mother was dating other men, he observed her coming home drunk with these men and may also have been witness to other inappropriate sexual activity.

In other words, Mr. Van Hook's early years were characterized by a mother who could not offer stability or adequate care-taking because she was either drunk, embroiled in a pathological relationship with her husband or running around with other men. His father also offered no stability since he was not there regularly and, when he was in the home, he was either drunk or "high" on drugs, behaving in a manner which would be terrifying to a youngster.

Life, for Mr. Van Hook, was very much like a "combat zone." This may explain his early and

continuing attachment to fantansies about war and the military. Whether Mr. Van Hook became involved in military fantasies as a way of coping with anger against family members, or whether he was attempting to master his own anxiety about the aggression in the household, matters little. What is important is that fantasies about killing and war began very early for Mr. Van Hook. His mother remembers that he always wanted to wear army clothing and he was accustomed to sleeping in his little army uniform. Mr. Van Hook remembers having a set of "GI Joe" figurines which he used to re-enact wars, making the figures punch each other and staging wars with them. As he grew older, his fascination with combat continued. Mr. Van Hook states that he began reading books about World War II and, later, about the Vietnam conflict. Mr. Van Hook did serve in the Army for four-and-a-half years, being honorably discharged as alcohol and drug dependent. He regrets that he was unable to serve in Vietnam and exhibits an obsession with Vietnam-era military exploits.

The client indicated that he would always "hang around" people who had been in Vietnam in order to hear about "war stories." He has read at length on the subjects of guerilla warfare and psychological warfare. At one point during the interview, with no solicitation of this material, the client started talking about various gruesome and gory tortures perpetrated by the Viet Cong. Once started, he was unable to stop and continued until the subject was changed. Mr. Van Hook's discussion in this vein reveals a fantasy-identity as a combat

warrior, as well as fascination with bizarre, aggressive behavior.

In addition to soothing his anxiety through fantasies of being strong and brave in combat, Mr. Van Hook soon learned, perhaps by imitation, that substance abuse could also soothe those feelings. Mr. Van Hook states that he began sneaking sips from his parents drinks before he was three years old. At the age of nine, he began drinking and bar-hopping with his father. At the age of 14, Mr. Van Hook began using marijuana, amphetamines and hallucinogens. He began by stealing his father's amphetamines and Valiums. As he entered his teenage years, he continued with abuse of multiple substances. In the Army in Germany, the client began using hashish as well as intravenous use of heroin and morphine. When he discontinued the heroin and morphine, he continued to inject speed and acid. He often combined drugs with alcohol, reaching the point where he could drink a fifth of liquor at one time. There were two occasions, when he was in the service, when he slashed his arms his razor blades, when drunk. Mr. Van Hook was given a drug and alcohol discharge from the service in 1982. In 1984, he did receive in-patient drug treatment at the Veterans Administration Hospital, followed by out-patient treatment with a drug counselor.

Mr. Van Hook's initiation into drug and alcohol abuse coincided with a period of time when he and his father moved to Florida for six months. That was around the age of 11. From age 11 on, Mr. Van Hook spent periods of time with his father, with

his mother, with an aunt and later, after his mother remarried, with his mother and stepfather. Around the age of 14, Mr. Van Hook and his father moved back to Florida. It was while living in Florida that Mr. Van Hook was initiated into "rolling gays." Mr. Van Hook stated that he met a man who showed him how to take advantage of gay men – "How to coax them into a room to have sex and knock them out and take their money." He indicates that prior to this, he had been working as a homosexual prostitute in order to earn money. Mr. Van Hook said he felt "disgraced" by this activity and saw himself as an inferior and worthless person when involved in male prostitution. Accordingly, he decided to be the aggressor and not the victim, and began robbing homosexuals for money. The client indicates that he would do this by luring the man with promises of sex, getting the victim to undress so that he was vulnerable and then using either verbal intimidation or physical force (punching) to get money. He states that none of his victims ever pressed charges against him.

On February 18, 1985, Mr. Van Hook went to the Subway Bar, in downtown Cincinnati, in order to rob a homosexual. Prior to arriving in downtown, Mr. Van Hook had been drinking at a bar in Mt. Healthy. He does not recall the amount of alcohol he drank, but states he was drinking vodka and grapefruit juice. At one point he bought some joints of marijuana and two "speckled birds" (amphetamine tablets) from another bar patron. He smoked the marijuana, but does not recall taking the amphetamine tablets. Mr. Van Hook has difficulty pinpointing the exact time at which events occurred.

However, it appears that he had been drinking a number of hours in Mt. Healthy before arriving at the Subway Bar. There, he began talking with David Self. The client stated that he used his usual technique to "feel out" his victim. That is, he told Mr. Self, "I'm expensive." (Mr. Van Hook states that at this point, the would-be victim will either decline because he cannot "afford" Mr. Van Hook's services or, the victim will indicate that he can "afford" him.) Mr. Van Hook states that the victim, Mr. Self, told him that he had money and the two left the bar, driving in Mr. Van Hook's car to the victim's apartment.

When Mr. Van Hook arrived at the victim's apartment, he was under the influence of alcohol. He may have been under the influence of drugs, but this remains unknown because he has given a variety of stories in that regard. That is, Mr. Van Hook told me he could not recall whether he took "two hits of speed" prior to arriving at Mr. Self's apartment, whereas, he told other examiners that he had used speed, as well as alcohol and marijuana. Further, Mr. Van Hook indicated to me that he could not recall whether he and the victim, Mr. Self, smoked marijuana prior to Mr. Van Hook's attack on Mr. Self.

Mr. Van Hook stated that when the victim approached him for oral sex, he grabbed his head in a hammer-lock, rendering him unconscious on the floor. He states that he then went to the kitchen, got a paring knife and, while fantasizing himself as being a military hero in Vietnam, twisted the knife in Mr. Self's head, attempted to cut his head off and

slit his stomach open in order to "reach his heart so I could eat it." Mr. Van Hook's only explanation for his behavior is, "I clocked out. I thought I was in the jungle and he was a Viet Cong and had snuck up on me."

The client's bizarre and violent attack on David Self was an expression of diffuse, primitive rage. It was a generalized discharge of his own underlying hate and aggression. What set off the blitz attack remains unclear. In his statement to the police, Mr. Van Hook alludes to the fact that he vented his rage on Mr. Self after finding out that the victim, who had promised him money, actually had no money. This may be one explanation. Another explanation may be that the client found himself interested in, and tempted to have a sexual relationship with Mr. Self, when the victim approached him. This may have precipitated a homosexual panic, together with an enraged and murderous response to having these "disgraceful" feelings arise in him. Although the motivation cannot be accurately stated, given Mr. Van Hook's inability or unwillingness to articulate it himself, what is clear is that Mr. Van Hook's chronic, intense anger, exhibited previously in assaultive behavior of varying severity, exploded into senseless and bizarre brutality. His murderous acts were carried out while immersed in long-standing fantasies of being a military hero.

Conclusions: Robert Van Hook, a 25 year old, divorced, white male was evaluated in regard to mitigation of penalty, pursuant to Ohio Revised Code 2947.06, having been convicted of Aggravated

Murder with Specifications. Evaluation reveals a man who is neither mentally ill, nor mentally retarded. He is the product of an unstable, non-nurturant, violent, and chaotic background, as outlined above. Descriptions given by Mr. Van Hook and family members indicate that his early years were characterized by inadequate parental care due to absence and/or unavailability of the mother because of drinking, repeated abandonment by her, exposure to physical and sexual violence, and exposure to substance abuse. These factors preclude development of a healthy, normal personality. Instead, Mr. Van Hook developed a serious personality disorder, i.e., borderline personality disorder. This disorder is characterized by chronic intense anger, feelings of worthlessness and self hate, inability to develop relationships with others except for meeting one's own needs and chronic feelings of insecurity and emptiness due to inability to function socially or vocationally. Mr. Van Hook has adopted two methods of dealing with these impairments. He has developed a long-term fantasy life in which he is a heroic military man. Even after leaving the Army, he continued to wear combat fatigues on the street and continued to read novels about war. Mr. Van Hook's other method of coping was to seek oblivion through drugs or alcohol. He is, in fact, chemically dependent.

It is my opinion that at the time of committing the offense, Robert Van Hook was not suffering from any mental disease or defect which substantially impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The offense was the

product of a discharge of primitive rage which is not uncharacteristic in a borderline personality disorder. While the motivation for this rage remains unknown and while the rage evoked familiar fantasies in Mr. Van Hook of being a hero in combat, major elements of his behavior were goal-directed, i.e., intending to rob the victim, wiping off finger prints, searching the house for valuables and flight to avoid detection. The fact that Mr. Van Hook was under the influence of unspecified chemicals at the time also contributed to a lowering of inhibitions and an acting-out of rage.

If there are any further questions, please do not hesitate to call me at 352-3116.

Yours Respectfully,

s/ Donna E. Winter, Ph.D.
Clinical Psychologist

DEW/ep
7/30/85

APPENDIX Q

Richard L. Bell Fee Request
August 16, 1985

APPLICATION, ENTRY AND CERTIFICATION
FOR ASSIGNED COUNSEL FEES

In the COMMON PLEAS Court of HAMILTON County

STATE OF OHIO
CITY OF
Plaintiff
vs.
ROBERT J. VAN HOOK
Defendant

CASE NO. B851349

APPLICATION

The undersigned having been previously appointed counsel for the Defendant moves this Court for an order awarding attorney at fees and expenses as indicated below and in the attached itemized statement, pursuant to Section 2941.51 and 120.33 of the Ohio Revised Code.

Date of Appointment: April 18, 1985
In Court Worked: In Court 45.0 Out of Court 125.4
Amount Paid: $ 4,250.00
TOTAL HOURS: 170.4
Total: $ 4,250.00

Disposition

A	Charge Sections Number and Name		Yes	No
a)	AGG Murder 2901.01	Plead'd Guilty to Indictment		X
b)	AGG Robbery 2911.01	Pleaded Guilty to Lesser Charge		X
c)		Went to Trial	X	
d)		Results CAC to AGG. Murder w/ specifications AGG. Robbery Sentenced to death in the electric chair. 10-25 yrs. concurrent on A Robbery		

B	CLASSIFICATION (Circle Appropriate Classification For Each Charge)								
a)	(F1)	F2	F3	F4	M1	M2	M3	M4	MM
b)	(F1)	F2	F3	F4	M1	M2	M3	M4	MM
c)	F1	F2	F3	F4	M1	M2	M3	M4	MM
d)	F1	F2	F3	F4	M1	M2	M3	M4	MM

Richard L Bell
Signature
RICHARD L. BELL
603 Main Street, Suite 410
Name and Address
Cincinnati, Ohio 45202
[redacted]
Social Security Number:

ENTRY

The Court finds that counsel performed the legal services set forth on the attached itemized Statement, that the fees and expenses set forth on said Statement are reasonable, and are in accordance with the Rules of the Board of County Commissioners of HAMILTON County, Ohio, governing payment of assigned counsel.

IT IS THEREFORE, ORDERED that such fees and expenses be, and are hereby approved. It is further ordered that said amount be, and hereby is, certified by the Court to the County Auditor for payment.

Judge

CERTIFICATION

The County Auditor in executing this certification attests to the accuracy of the figures contained herein and that the Ohio Public Defender Commission and/or the Auditor of State which reveals unreasonable fees or excessive costs may result in future adjustments against reimbursements or repayment of audit exceptions to the Ohio Public Defender Commission.

Voucher Number: 31
Fund Number:
Date:

County Auditor

Approved by Ohio Public Defender Commission

BEST AVAILABLE COPY

ASSIGNED COUNSEL ITEMIZED STATEMENT

DATE	ACTIVITY	TOTAL TIME
4-17-85	Went through jacket and docket, research on death penalty	1.5
4-22-85	Phone call from Stu Mattheus	.2
4-22-85	Research death penalty statute	1.5
4-23-85	Common Pleas Arraignment	.8
4-23-85	Consultation with client	1.5
4-24-85	Phone call with Joyce Luttrell	.1
4-25-85	Phone call with Joyce Luttrell	.6
4-26-85	Phone call with Stu Mattheus	.2
4-26-85	Discovery with prosecutor	1.5
4-26-85	Consultation with client and investigation of	2.5
4-26-85	Phone call with Joyce Luttrell	.6
4-30-85	Phone call from Marilyn Johnson	.1
5-1-85	Reviewed Motion, discussion with Stu Mattheus	.8
5-2-85	Drafted various entries and forms Drafted Motions for depositions, demp parkers	1.3
5-3-85	Filed Motions and hearings	.9
5-6-85	Phone call with Joyce Luttrell	.3
5-7-85	Phone calls	.3
5-8-85	Consultation with client	.8
5-9-85	Phone calls with Joyce Luttrell	.2
5-10-85	Met prosecutor discovery	1.0
5-13-85	Went through Robert's military awards, pictures, etc	1.5
5-13-85	Letter to Dr. Hoy	.3
5-14-85	Phone calls	.3
5-17-85	Consultation with Dr. Hoy	1.8
5-20-85	Reviewed statement and research	2.4
5-20-85	Client Consultation	.8
5-20-85	Phone calls	.5
5-20-85	Client Consultation	.8

I hereby affirm the above is a true and accurate account of the time spent in the preparation of this matter.

ROBERT VAN HOOK
ame Represented
B851389
se No
Kraft
udge
4/3/85
ate Assigned

Richard A Bell
Signature of Counsel
8/16/85
Date

ASSIGNED COUNSEL ITEMIZED STATEMENT

DATE	ACTIVITY	TOTAL TIME
3-21-85	Phone call with Joyce Luttrell	.5
3-27-85	Travel arrangements and cancellation of same	1.2
3-23-85	Consultation with client	.8
3-24-85	Phone calls	.2
3-27-85	Reviewed file	1.2
3-28-85	Conference with Carl Shaup V.A. Hospital	1.5
3-29-85	Attempted to get V.A. records	.9
3-29-85	Prepared first authorization	1.5
4-4-85	Reviewed report	.7
4-7-85	Discussion with Stu Matthews	.5
4-10-85	Consultation with client	.9
4-12-85	Phone calls	.4
4-13-85	Investigation	1.5
4-14-85	Research affirmative defenses	2.5
4-17-85	Motion to Suppress	2.0
4-18-85	Motion to Suppress and research	2.0
4-19-85	Reviewed psychiatric report	.5
4-20-85	Read Public Defender's Death Penalty Manual #1	3.5
4-22-85	Read and reviewed above manual's supplement, Motions	5.4
4-24-85	Reviewed Coleman file and motions	1.5
4-25-85	Memorandums Preparation of motions, review, drafting, research	6.5
4-27-85	Meet w/Stu Matthews, filing of all motions, research	1.5
4-28-85	Trial Preparation	2.0
7-1-85	Phone Calls	.3
7-2-85	Reviewed trial strategy	1.0
7-3-85	Client consultation	1.2
7-5-85	Meet w/ Marilyn Johnson	2.0
7-6-85	Meet. w/ Dr. Hoy	3.5

I hereby affirm the above is a true and accurate account of the time spent in the preparation of this matter.

ROBERT VAN HOOK
Name Represented

8851389
Cert No.

Kraft
Judge

4/3/85
Date

Richard F Bell
Signature of Counsel

8/16/85

ASSIGNED COUNSEL ITEMIZED STATEMENT

DATE	ACTIVITY	TOTAL TIME
7-8-85	Reviewed file, phone calls	.8
7-9-85	Jury screening and motions	4.3
7-10-85	Meet. w/ parents and trial preparation and depo. of Dr. Jolly	8.0
7-11-85	Conference	2.0
7-12-85	Trial preparation	8.0
7-13-85	Trial	3.0
7-15-85	Next day preparation	1.5
7-16-85	Trial	5.0
7-16-85	Trial preparation	2.5
7-17-85	Trial	4.0
7-17-85	Trial Preperation	2.1
7-18-85	Trial preparation	4.0
7-19-85	Conference w/ client, trial preparations	4.0
7-22-85	Conference w/ Dr. Cooper	2.0
7-22-85	Trial preparation	4.0
7-23-85	Trial preparation	6.5
7-24-85	Trial	4.0
7-24-85	Trial Preparation	1.5
7-26-85	Client consultation	.9
7-27-85	Phone calls	.4
7-29-85	Verdict, discussion w/ family, client consultation	2.0
7-28-85	Formulated & drafted Motion to Strike Death Penalty Spec. Research, read Steffen Appeal	6.5
7-29-85	client consultation	1.1
7-30-85	Preparation for Mitigation	4.0
7-31-85	Mitigation Hearing	8.0
8-2-85	Conference with client	.9
8-4-85	Phone calls	.3
8-6-85	Conference with client	.8

I hereby affirm the above is a true and accurate account of the time spent in the preparation of this matter.

ROBERT VAN HOOK
Name Represented

8851389
Case No.

Kraft
Judge

4/3/85
Date Assigned

Richard H Bell
Signature of Counsel

8/16/85
Date

ASSIGNED COUNSEL ITEMIZED STATEMENT

DATE	ACTIVITY	TOTAL TIME
8-8-85	Sentence	1.0
8-8-85	Conference with client, reviewed 28 pg. decision	1.5
8-12-85	Phone Calls	.5
8-16-85	Review of File	1.5

I hereby affirm the above is a true and accurate account of the time spent in the preparation of this matter.

Name Represented: ROBERT VAN HOOK

File No: 8851389

Judge: Kraft

Date Assigned: 4/3/85

Richard J. Bell
Signature of Counsel

8/16/85
Date

W. Stewart Mathews, II Fee Request
August 12, 1985

Form OPD-C-301 — Banner Graphics, Portsmouth, Scioto Co., Ohio

APPLICATION, ENTRY AND CERTIFICATION
FOR ASSIGNED COUNSEL FEES

To the Common Pleas Court of HAMILTON County

STATE OF OHIO,
CITY OF _____
Plaintiff
vs.
Robert J. Van Hook
Defendant

CASE NO. B 851389

APPLICATION

The undersigned having been previously appointed counsel for the Defendant moves this Court for an order approving payment of fees and expenses as indicated below and in the attached itemized statement, pursuant to Section 2941.51 and 120.33 of the Ohio Revised Code.

Date of Appointment: 4-3-85

Hours Worked: In Court 44 hrs 45 min Out of Court 108 hrs 45 min

Legal Fees: $ _____

Total: $ _____

Disposition

O. R. C. Charge Section Number and Name:		Yes	No
a) Aggravated Murder 2903.01	Pleaded Guilty to Indictment		X
b) Aggravated Robbery 2911.01	Pleaded Guilty to Lesser Charge		X
c) _____	Went to Trial	X	
d) _____	Result: Finding: GAC to Agg Murder • Specification • Agg Robbery - Sentence: Death in Electric Chair 10-25 yrs Consec -- Agg Robb		

OFFENSE CLASSIFICATION (Circle Appropriate Classification For Each Charge)

a)	(X)	F2	F3	F4	M1	M2	M3	M4	MM
b)	(F)	F2	F3	F4	M1	M2	M3	M4	MM
c)	F1	F2	F3	F4	M1	M2	M3	M4	MM
d)	F1	F2	F3	F4	M1	M2	M3	M4	MM

W. Stewart Mathews
Signature
W. Stewart Mathews II
517 Main Street - Suite 500
Name and Address
Cincinnati Ohio 45202
[redacted]
Social Security Number

ENTRY

The Court finds that counsel performed the legal services set forth on the attached Statement; and that the fees and expenses, as forth on said Statement are reasonable, and are in accordance with the resolution of the Board of County Commissioners of HAMILTON County, Ohio, relating to payment of assigned counsel.

IT IS THEREFORE ORDERED that such fees and expenses be, and are hereby approved. It is further ordered that the said amount be, and hereby is, certified by the Court to the County Auditor for payment.

_____
Judge

CERTIFICATION

The County Auditor in executing this certification attests to the accuracy of the figures contained herein. A new point scale by the Ohio Public Defender Commission and/or the Auditor of State which prevents unallowable or excessive costs may result in future adjustments against reimbursements or repayments of audit exceptions to the Ohio Public Defender Commission.

County Number: 31
Check Number: _____
Check Date: _____

_____
County Auditor

Form Provided by Ohio Public Defender Commission

ASSIGNED COUNSEL ITEMIZED STATEMENT

DATE	ACTIVITY	TOTAL TIME
4-15-85	Client Int Cont	1hr 30m
4-17-85	Call from Joyce Luttrell	20 mm
4-17-85	Rev R. P. H	1 hr —
4-18-85	Check Crim Clks Rec R. Denied	20 mm
4-18-85	Prep Proj Document Req. Next	45 mm
4-22-85	Call to Bob Bell	10 mm
4-23-85	Call to Joyce Luttrell	10 mm
4-23-85	Comm. Plea Arraign	45 mm
4-22-85	Client at jail	1 hr 30 m
4-23-85	Call from Tom Moorhead	10 mm
4-23-85	Call from Joyce Luttrell	10 mm
4-24-85	Call from Ted Trombetta	10 mm
4-26-85	Call from Ted Trombetta	10 mm
4-26-85	Call to Bob Bell	10 mm
4-26-85	See Pravento - Re: Drivers	1.3 30 mm
4-26-85	Call to Bob Bell	10 mm
4-29-85	Call from Ted Trombetta	10 mm
4-30-85	Prepare Entry Appt Psyl	20 mm
5-1-85	Research	2 hrs
5-1-85	Draft Motion for Cont. to Suppress	1 hr
5-2-85	Client in jail	1 hr
5-3-85	Hearing on Motion for Depo etc	45 mm
5-10-85	Meet Psa - Re: Drivers	1 hr
5-14-85	Make Depo travel arrangements	1 hr 30 m
5-16-85	Prep for Depo	1 hr
5-17-85	Disc w/ Bob Bell	20 mm
5-20-85	Client - jail	1 hr
5-21-85	Call from Joyce Smith	10 mm

I hereby affirm the above is a true and accurate account of the time spent in the preparation of this matter.

Robert J. Van Hook
ney Represented

B551389
ber No.

Kraft, J
dge

6-3-85
ate Assigned

William Stewart Matthewman
Signature of Counsel

8-12-85
Date

ASSIGNED COUNSEL ITEMIZED STATEMENT

DATE	ACTIVITY	TOTAL TIME
22 6-24-85	Depo & Trav in Ft Lauderdale, Fla	24 hrs
5-28-85	Mtg w/ Cnsl Hupp - VA Hosp	1 hr 20
6-4-85	Report	45
6-4-85	Client Tel pd	1 hr
6-4-85	Prep of Motion for Psych Records	30
6-4-85	Call from Joyce Luttrell	10
6-6-85	Prep of Subpoe	20
6-7-85	Conf w/ Dr Schmittgenberg	30
6-7-85	Call to Hollie Mem Re Nitzschke rept	10
6-7-85	Conf w/ Rod Rell	30
6-10-85	File Motion for Psych Records	20
6-12-85	Call to Ted Trammell	10
6-17-85	Research & Prep for Motion Suppress	1 hr 30
6-17-85	Motion to Suppress	2 hrs
6-18-85	Motion to Suppress	3 hrs
6-18-85	Draft Entry	20
6-21-85	Sec'y - Marked Re Psych Records	30
6-24-85	Deliver Psych Records to Mary Schmaltz	20
6-26-85	Pub. Special Venire	1 hr
6-25-85	Trial Prep	3 hrs
6-25-85	Several Motions	
6-25-85	Motion Hearing & Signing of Entries File & Return	1:5 30
6-27-85	Call from Tom Moorhead	10
6-27-85	Trial Prep	1 hr
6-28-85	Call from Mary Schmaltzenberg	10
7-2-85	Call from Rod Rell	10
7-5-85	Mtg w/ Marilyn Johnson	7 hrs
7-6-85	Mtg w/ Dr Itzy	3 hrs 30

I hereby affirm the above is a true and accurate account of the time spent in the preparation of this matter.

Robert T Van Hook
Party Represented

B 95 1319
Case No.

Wolf, J
Judge

7-7-85

Signature of Counsel

ASSIGNED COUNSEL ITEMIZED STATEMENT

DATE	ACTIVITY	TOTAL TIME
7-9-85	Arraignment and Motion	4 hrs 30
7-10-85	Meet w/ parents	2 hrs
7-10-85	Depos of Da Jolly	3 hrs
7-11-85	Daubt entries and trial prep	6 hrs
7-12-85	Trial Prep	8 hrs
7-13-85	Trial Prep	6 hrs
7-15-85	Trial	4 hrs
7-15-85	Trial Prep	2 hrs
7-16-85	Trial	4 hrs
7-16-85	Trial Prep	3 hrs
7-17-85	Trial	4 hrs
7-18-85	Trial Prep	4 hrs
7-19-85	Trial Prep Conf Client	4 hrs
7-22-85	Meet w/ Da Cooper	2 hrs
7-22-85	Trial Prep	4.0
7-23-85	Trial	4 hrs 30
7-24-85	Trial	4 hrs
7-29-85	Verdict etc	2 hrs
7-29-85	Issue subpoenas for Mitigation Hearing	30
7-30-85	Prep for Mitigation Hearing	4 hrs
7-31-85	Mitigation Hearing	8 hrs
8-1-85	Sentence	1 hr
8-1-85	Prep of Appeal Documents	1 hr
8-8-85	Client to jail	1 hr
8-11-85	Call from Ted Frankel	.10

Robert T Van Hook
Party Represented

355389
Case No.

Kraft, J.
Judge

I hereby affirm the above is a true and accurate account of the time spent in the preparation of this matter.

William Stewart Matthewman
Signature of Counsel

OPPOSITION BRIEF

(4)

NO. 09-144

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID BOBBY, WARDEN, Petitioner,

v.

ROBERT J. VAN HOOK, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAPITAL CASE

RECEIVED
SEP - 2 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Keith A. Yeazel (Counsel of Record)
Attorney at Law
5354 North High Street
Columbus, Ohio 43214
(614) 885-2900

James D. Owen
Attorney at Law
5354 North High Street
Columbus, Ohio 43214
(614) 436-3245

Counsel for Respondent,
Robert J. Van Hook

CAPITAL CASE

Question Presented

Whether the United States Court of Appeals for the Sixth Circuit properly applied the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984) when it found ineffective assistance of counsel in the sentencing phase of a capital trial?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
REASONS FOR DENYING THE WRIT	1
I. The court of appeals properly applied the *Strickland* standard	2
A. The court of appeals properly applied the performance prong of the *Strickland* standard	3
B. The Sixth Circuit properly evaluated the prejudice prong of the *Strickland* standard	12
CONCLUSION	17

TABLE OF AUTHORITIES

I. CASES: Page

Ex parte Reiber,
663 So. 2d 999 (Ala. 1995) 9

Glenn v. Tate,
71 F.3d 1204 (CA6 1995) 9

Knowles v. Mirzayance,
566 U.S.___, 129 S.Ct. 1441 (2009) 2

Lockett v. Ohio,
438 U.S. 586 (1978) 3, 6

Payne v. Tennessee,
501 U.S. 808 (1991) 9

Rompilla v. Beard,
545 U.S. 374 (2005) 5

State v. Bernard,
608 So. 2d 966 (La.1992) 9

State v. Card,
825 P.2d 1081 (Idaho 1991) 9

State v. Esparza,
39 Ohio St.3d 8 (1988) 6

State v. Joubert,
455 N.W.2d 117 (Neb. 1990) 9

State v. Muhammad,
678 A.2d 164 (N.J. 1996) 9

State v. Roll,
942 S.W.2d 370 (Mo. 1997) 9

State v. Treesh,
739 N.E.2d 749 (Ohio 2001) 9

State v. White,
15 Ohio St.2d 146 (1968) 9

Strickland v. Washington,
466 U.S. 668 (1984) 1, 2, 12

Van Hook v. Anderson,
560 F.3d 523 (2009) 2, 12, 13

Wiggins v. Smith,
539 U.S. 510 (2003) 2, 12

Williams v. Taylor,
529 U.S. 362 (2000) 2, 5

Zant v. Stephens,
462 U.S. 862, 879 (1983) 10

II. **Other Authorities:**

O.R.C. § 2929.024 7

O.R.C. § 2929.03 ..... 5, 6, 7, 8, 9, 11, 13, 14

O.R.C. § 2929.04 ..... 11, 14, 15

O.R.C. § 2945.39 ..... 5, 6

1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.) 2, 5

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID BOBBY, WARDEN, Petitioner,

v.

ROBERT J. VAN HOOK, Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

The Sixth Circuit's resolution of Van Hook's ineffective assistance of counsel issues is well within the mainstream of Supreme Court precedent and does not present any error, let alone an error of compelling importance. Nor does the panel opinion conflict with a decision of another United States court of appeals. The issue actually adjudicated in the Sixth Circuit was whether Van Hook's counsel were ineffective for failing to fully investigate and present all available mitigating factors. After careful review of the record , the Sixth Circuit concluded that as a consequence of Van Hook's counsels' acts and omissions, the sentencer did not have all the relevant available information necessary to decide whether a sentence of less than death should be imposed. Under the particular facts of this case, Van Hook was denied his right to the effective assistance of counsel during the investigation and presentation of mitigation evidence. The panel decision should be affirmed.

REASONS FOR DENYING THE WRIT

The Warden's petition essentially presents the question of whether the court of appeals correctly applied the *Strickland v. Washington*, 466 U.S. 668 (1984) standard in finding ineffective assistance of counsel during the investigation and presentation of mitigation evidence in Van Hook's capital trial. That question does not warrant this court's review because the sentencer was deprived of powerful, non-cumulative mitigating evidence that could have reduced Van Hook's sentence from

death to life imprisonment.

I.

THE COURT OF APPEALS PROPERLY APPLIED THE *STRICKLAND* STANDARD

The court of appeals found that Van Hook's trial counsel rendered ineffective assistance by failing to fully investigate and present as evidence all available mitigating factors. *Van Hook v. Anderson*, 560 F.3d 523, 525 (2009), Petitioner's App. 4a. The Sixth Circuit's analysis began with a proper statement of the applicable standards: "For Van Hook to prove his counsel's performance was constitutionally deficient, the performance must have fallen 'below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. at 688, 'under prevailing professional norms.'" *Van Hook*, 560 F.3d at 526, Petitioner's App. 5a. The *Strickland* test of necessity requires a case-by-case examination of the evidence. *Williams v. Taylor*, 529 U.S. 362, 391 (2000). Because the *Strickland* standard is a general standard, a court has latitude to reasonably determine whether a defendant has or has not satisfied that standard. *Knowles v. Mirzayance*, 566 U.S.___, 129 S.Ct. 1441, 1420 (2009). The prevailing professional norms arise from the professional standards that prevailed in Ohio at the time of Van Hook's trial and the standards of practice as reflected by the American Bar Association. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

At the time of Van Hook's trial, the ABA standards indicated:

> It the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admission or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). Some of the relevant prevailing professional norms for capital defense counsel in Ohio at the time of Van Hook's trial provided:

> The pretrial investigation in a capital case must include the complete investigation of mitigation phase witnesses, issues and mitigating factors. . . The purpose of the investigation is to explain the reason the accused committed the offense. (Affidavit of

Samuel B. Weiner, Esq., ¶¶ 13, 25); and

> Counsel should seek a full psychological evaluation of the client's background. A proper mental health evaluation is not simply an insanity or a diminished capacity evaluation. Counsel should direct the mental health professional as to what constitutes a mitigation evaluation. The psychological evaluation and testing should be confidential.(Affidavit of Samuel B. Weiner, Esq., ¶¶ 26, 27).

With these standards and professional norms in mind the court of appeals held that Van Hook's counsel performed deficiently and the deficient performance deprived him of a reliable sentencing proceeding.

A. The court of appeals properly applied the performance prong of the *Strickland* standard.

The scope of a defense counsels' duty to investigate mitigation evidence is informed by case law. A sentencer can not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). From *Lockett* arises the concomitant duty for capital defense counsel to reasonably investigate any aspect of their client's character or record and any of the circumstances of the offense that could serve as a basis for a sentence less than death.

Trial counsels' preparation for the mitigation phase consisted of interviewing Joyce Lauttrell (Van Hook's Mother), Marilyn Johnson (Van Hook's maternal Aunt) and Dr. Robert T. Hoy (a friend). (Trial Counsel time-sheets, Petitioner's App. 379a-387a). A mere two days before the mitigation hearing was scheduled to begin, defense counsel requested a non-confidential mental health examination and presentence investigation report. (Order). Between the time Van Hook was found guilty and the mitigation hearing, trial counsel failed to meet with potential mitigation witnesses or conduct any investigation. (Trial Counsel time sheets, Petitioner's App. 379a-387a).

Trial counsels' actual theory of mitigation in Van Hook's case was that (1) the victim of the offense induced or facilitated the offense; (2) Van Hook, at the time of the offense was

suffering some mental disease or defect and lacked substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law; (3) Van Hook lacked a significant prior criminal history; and (4) there were other factors that are relevant to the issue of whether or not the offender should be put to death.

Trial counsel presented two expert witnesses at mitigation. Both contradicted defense counsels' mitigation theory. Dr. Emmett Cooper testified that Van Hook did not suffer from a mental disease or defect that led to the death of Mr. Self. Likewise, Dr. Nancy Schmidtgoessling testified that Van Hook's personality disorder was not a mental disease. Neither doctor had a complete set of relevant records or Van Hook's complete pyscho-social history

Trial counsel also presented six lay witnesses. Two witnesses testified that the victim, David Self, willingly took Van Hook to his home. Van Hook's father testified about his own substance abuse, introducing his son to drugs and alcohol when he was 11 or 12, and that he never mistreated his son. (Petitioner's App. 307a). Van Hook's mother testified extensively about her own mental and alcohol abuse problems, as well as Van Hook's substance abuse, being shuttled between residences of his mother, father, and aunt, attempts at suicide and his homosexual relationship with his uncle. (Petitioner's App. 335). Van Hook's aunt, Marilyn Johnson, testified that Van Hook was left in her care for much of his early childhood. (Petitioner's App. 356a). A friend of about one year, Dr. Hoy, testified that Van Hook would provide him transportation so that he could attend the ballet, plays, and movies. Counsel did not interview numerous family members who could have provided a comprehensive picture of Van Hook's childhood, one that was filled with violence, abuse, and psychological problems.

Counsel also failed to obtain and introduce available documents that contained a wealth of mitigating evidence. For example, defense counsel did not obtain Van Hook's military records or records regarding Van Hook's hospitalizations that were crucial for a psychologist to review in order to competently evaluate Van Hook for his defense. These records could have verified Van Hook's fascination with the military, his use and abuse of alcohol and drugs, and his sexual

orientation confusion, and other related matters. (Affidavit of Dr. James R. Eisenberg, Psychologist). Counsel did not introduce available VA records. For example, Van Hook's drinking problem was so extreme that he drank 1 ½ cases of beer at a time. (VA records). The VA records indicated further lines of inquiry such as a hospitalization for a suicide attempt in 1981 and a hospitalization for psychiatric reasons in early 1984. (VA records). There is no evidence that trial counsel followed up on these leads. Like the trial counsel in *Rompilla v. Beard*, 545 U.S. 374 (2005), Van Hook's counsel did not go to "historical sources" that might have cast light on Van Hook's mental condition. The Court has recognized that counsel are ineffective when they fail to introduce available mitigation evidence. See, *Williams v. Taylor*, 529 U.S. 362 (2000). The standards of practice in 1985 dictated that a sentencing investigation be conducted prior to the commencement of trial in order to allow counsel to make strategic decisions concerning the interrelation of sentencing and guilt issues. 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). Instead, trial counsel relied upon the Cincinnati Adult Probation Department to prepare a social history of Van Hook over a 48 hour period following the verdict. (Preliminary Investigation). That social history did not take into account important detailed information from numerous family members and government records regarding Van Hook's nightmarish upbringing. As such, the defense case for life was far weaker than it should have been due to inadequate investigation.

While not a basis for issuing the writ, it is contextually important to note that trial counsel did not satisfy prevailing norms when they failed to secure or attempt to secure a full psychological evaluation of Van Hook. Van Hook's counsel entered a plea of not guilty by reason of insanity. In response, the trial court ordered three evaluations of the defendant's mental condition at the time of the commission of the offense in accordance with Ohio Revised Code ("O.R.C.") § 2929.03(D)(1). Pursuant to O.R.C. § 2945.39(C), the court-appointed examiners were required to "complete the examination within thirty days after the court's order for the evaluation" and to "prepare and provide to the court, prosecutor and defense counsel a written

report concerning the mental condition of the defendant." However, none of the examiners were required to speak to defense counsel, explain their reports to defense counsel, or in any other way assist with the defense. In addition, under O.R.C. § 2945.39(A), the scope of the examiners' reports was limited to the defendant's mental condition at the time of the commission of the offense. All of the reports prepared by the mental health examiners concluded that Van Hook's mental problems did not meet the legal definition of insanity. Under prevailing norms existing at the time of trial, an insanity assessment is not an acceptable substitute for a full psychological evaluation of a capital defendant. (Affidavit of Samuel B. Weiner, Esq.,¶ 26). Thus, the sanity examination was not an adequate substitute for counsel to discharge their duty to investigate mitigation and present the salient aspects of the client's life history which might otherwise support a sentence of less than death. *Lockett*, 438 U.S. at 604.

At the time of Van Hook's trial he had a statutory right to expert assistance. O.R.C. § 2929.024 required a trial court to provide expert assistance when it is reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing. The services provided by this statute are available to the indigent defendant solely for his own purposes in mounting a defense in a capital trial. *State v. Esparza*, 39 Ohio St.3d 8, 10 (1988). The provisions of O.R.C. § 2929.024 are wholly independent of the O.R.C. § 2929.03(D)(1) provisions of Ohio law concerning the evaluation of a defendant's sanity at the time of the offense. *Esparza*, 39 Ohio St.3d at 9.

Nevertheless, Van Hook's trial counsel never made a request for any expert assistance as provided under O.R.C. § 2929.024. Had trial counsel sought and obtained psychiatric evidence, like that of Dr. Martin Ryan, to establish Van Hook suffered from a mental disease or defect, they could have effectively rebutted the inaccurate testimony of the court-appointed psychologists as follows:

> Van Hook's severe Borderline Personality Disorder was a mental disease or defect under accepted standards of the American Psychiatric Association;
>
> The homicide was primarily the product of psychosis;

> Van Hook's psychotic state at the time of the homicide was primarily the product of his severe Borderline Personality Disorder; and
>
> It was reasonably likely Van Hook assaulted David Self as the result of homophobic panic.

(Affidavit of Martin T. Ryan, M.D.).

During state post conviction, counsel retained the assistance of Dr. James R. Eisenberg to evaluate Appellant. Dr. Eisenberg, indicated that the psychiatric and psychological evaluations conducted by the court's clinic, among other things, failed to address Van Hook's sexual development as it relates to ego-dystonic homosexuality. (Dr. Eisenberg Affidavit). Ego-dystonic homosexuality is a condition where the individual hates themself for being homosexual. The ego-dystonic diagnosis provides an explanation as to why Van Hook would lie to the police and tell them that his motivation was robbery as opposed his own deep-seated revulsion to his own homosexuality. With available psychological evidence from experts like Dr. Ryan and Dr. Eisenberg, a sentencer would have been able to find the death was a result of homophobic panic.

Another relevant consideration, although not basis for issuance of the writ, is that trial counsel failed to satisfy prevailing norms by introducing and also failing to oppose the introduction of evidence that clearly damaged the defense mitigation case. As previously discussed, defense counsels' theory of mitigation was predicated upon the following factors:

(1) the victim of the offense induced or facilitated the offense;

(2) Van Hook, at the time of the offense was suffering some mental disease or defect and lacked substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law;

(3) Van Hook lacked a significant prior criminal history; and

(4) there were other factors that are relevant to the issue of whether or not the offender should be put to death.

(Transcript).

On July 29, 1985, trial counsel requested a presentence investigation report ("PSIR") and a mental evaluation be conducted and submitted to the trial court for its consideration during the mitigation hearing in accordance with O.R.C. § 2929.03(D)(1). The trial court continued the

mitigation hearing until July 31, 1985, so that the PSIR and mental evaluation could be completed. The PSIR and mental evaluation were conducted 24 hours prior to the July 31 mitigation hearing. Contrary to the Warden's assertions, (Petition at 21), the defense mitigation investigation did not begin well in advance of trial.

Trial counsel did not meet prevailing professional standards in 1985 when they requested a presentence investigation be conducted by the Cincinnati Probation Department for mitigation and a psychological report. Under no circumstances should trial counsel request a presentence investigation, and certainly it should not substitute for trial counsel's own investigation into possible mitigation. (Affidavit of Samuel Weiner, ¶ 23). The PSIR request was made without doing any independent investigation of Van Hook's history and without collecting any information to give to the agency making the reports. Trial counsel knew at the time of the request that the non-confidential report and evaluation would be completed in one day. They did not know whether information contained in the report submitted to the sentencer would mitigate or condemn Van Hook to a sentence of death. Further, they did not object to the introduction into evidence of all the information contained with the report.

In *Glenn v. Tate*, 71 F.3d 1204 (CA6 1995), the Sixth Circuit found trial counsel ineffective for failing to conduct a mitigation investigation and hire an independent psychologist to evaluate the defendant. Trial counsel in *Glenn* also requested a presentence investigation report without understanding that anything contained in that report would be admitted into evidence. The trial attorneys in *Glenn* later asked the trial court to keep damaging portions of the report out of the record, but the trial court refused. The Court explained:

> Defense counsel asked the trial court to redact this sentence before sending the report to the jury, but the court refused to do so. This was probably an error on the court's part in our view. The problem would never have arisen, however, if defense counsel had not settled for court-appointed experts whose reports were going to be given to the jury willy-nilly, rather than exercising the right to obtain defense experts under O.R.C. § 2929.024 . . . .

Id. at 1210. Here, Van Hook's counsel were similarly oblivious to the consequences of ordering a presentence investigation under O.R.C. § 2929.03(D)(1).

Exacerbating this error is the fact that victim impact statements were included within the PSIR considered by the sentencer. The report itself contained a recommendation from a Cincinnati Police Officer that Van Hook receive the death penalty. (Preliminary Investigation). Accompanying the report was a victim impact statement from the victim's mother requesting that the court sentence Van Hook to death because "if this does not occur it just compounds the offense." (Victim Impact Statement). Trial counsel did not object to this information being considered by the sentencer. (Transcript).

Professional norms required that trial counsel oppose the consideration of such evidence. At the time of Van Hook's trial, Ohio law did not allow the admission of victim impact evidence. *State v. White*, 15 Ohio St.2d 146, syl. 2 (1968). Nor does Ohio allow the admission of a victim impact witness's testimony as to the appropriate sentence for a capital defendant today. *State v. Treesh*, 739 N.E.2d 749, 776-78 (Ohio 2001). Most jurisdictions deem such evidence inadmissible. See, e.g., *Ex parte Reiber*, 663 So. 2d 999, 1006 (Ala. 1995) (holding that a presentence report containing the opinion of the victim's husband on the appropriate sentence for the defendant was harmless error); *State v. Card*, 825 P.2d 1081, 1089-90 (Idaho 1991) (finding opinion as to the proper sentence inadmissible, but harmless because sentencing judge did not consider it); *State v. Bernard*, 608 So. 2d 966, 970-73 (La.1992) (finding survivors' opinions about the crime and appropriate punishment irrelevant and as such inadmissible); *State v. Roll*, 942 S.W.2d 370, 378 (Mo. 1997) (holding that opinion of four of the victims' family members that defendant should receive the death penalty was inadmissible, but that the error was harmless); *State v. Joubert*, 455 N.W.2d 117, 129-30 (Neb. 1990) (finding victim's family members' characterizations about the defendant or their opinions as to the appropriate sentence inadmissible, but harmless because the sentencing judge is entitled to a presumption that he did not rely upon erroneously admitted evidence); *State v. Muhammad*, 678 A.2d 164, 176-77 (N.J. 1996) (holding that admission of survivor's opinions on the correct punishment, the defendant and the crime violates the Eighth Amendment); *Payne v. Tennessee*, 501 U.S. 808, 830 n.2, 833, 835 n.1. (1991)(the admission of a

victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment).

Moreover, in a capital case, the sentencer is required to make an "individualized determination" as to whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). Under such a regimen, the opinions of the victim's family members as to the appropriate punishment are unrelated to the blameworthiness of a particular defendant. As a consequence, Van Hook's trial counsel had a duty to oppose the admission of statements from the victim's mother and police calling for the imposition of a death sentence. Due to trial counsels' failure to oppose the consideration of opinion evidence as to the appropriate penalty, the state's case for death was much stronger than it should have been under governing law.

Van Hook fared no better with the requested presentence mental examination. Dr. Donna Winter, the court clinic psychologist, conducted the mental evaluation in one day, and issued a report for the court's consideration on July 31, 1985. (Petitioner's App.368a). After noting that Van Hook's characteristics were consistent with borderline personality disorder, Dr. Winter stated in her report:

> The most salient aspect of borderline personality disorder is the presence of intense anger which can be discharged in a diffuse, primitive rage, resulting in bizarre acts of aggression and violence. This description is consonant with Robert Van Hook's behavior in the murder of David Self.

(Petitioner's App.370a). Dr. Winter described Van Hook's 'bizarre and violent attack on David Self' as an "expression of diffuse primitive rage." (Petitioner's App.376a). Later, in discussing Van Hook's motivation for murdering David Self, Dr. Winter observed:

> Mr. Van Hook's chronic intense anger, exhibited previously in assaultive behavior of varying severity, exploded into senseless and bizarre brutality.

(Petitioner's App.376a). In conclusion, Dr. Winter declared:

> It is my opinion that at the time of committing the offense, Robert Van Hook was not suffering from any mental disease or defect which substantially impaired his capacity

> to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(Petitioner's App.377a-378a). Dr. Winter never explained how Van Hook's behavior was sculpted by the abusive and destructive environment in which he grew up. Defense counsel, in effect, ceded control of the mitigation investigation by requesting a psychological evaluation under the auspices of O.R.C. § 2929.03(D).

As a result, the "mitigation" evidence offered by trial counsel during the sentencing phase included a report which (1) characterized Van Hook as violent and capable of "primitive rage," (2) stated that Van Hook has demonstrated this behavior in past assaults, and (3) negated the presence of a mitigating factor under O.R.C. § 2929.04 (B)(3). Realizing that this report contained exquisite evidence undermining the defense case for life, the prosecution drew extensively from Dr. Winter's report and emphasized those exact passages quoted above to the sentencer in its closing argument in support of a death sentence. (Transcript). This extremely damaging mental health testimony did nothing to advance the case for mitigation and, instead, advanced the prosecution's pleas for death. In such a situation, additional available favorable mitigation evidence was crucial to fulfilling counsels' duty to present evidence to the sentencer that could provide a basis for a sentence of less than death.

B. The Sixth Circuit properly evaluated the prejudice prong of the *Strickland* standard.

To assess potential prejudice to the accused at sentencing, the reviewing court must consider the evidence in aggravation presented at trial against the total available mitigating evidence presented both at trial and in post conviction proceedings, *see Wiggins v. Smith*, 539 U.S. at 534, to determine whether there is a reasonably probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Strickland*, 466 U.S. at 695. During its prejudice analysis, the court of appeals correctly observed that Ohio is a

weighing state. *Van Hook*, 560 F.3d at 529-30, Petitioner's App. 13a. Van Hook's conviction only qualified for one of Ohio's statutory aggravating circumstances. For purposes of evaluating prejudice in Van Hook's case, the weight of the single aggravating circumstance remains the same. However, the introduction of additional available mitigation evidence changes the relative balance and could tip the scales in favor of life. *Van Hook*, 560 F.3d at 530, Petitioner's App. 13a-14a. Contrary to the Warden's assertions (Petition at 24), there is simply nothing controversial about that observation by the court of appeals.

Van Hook's counsel failed to satisfy prevailing norms by (1) failing to conduct an adequate and independent mitigation investigation; (2) failing to obtain an independent mental health expert to evaluate and explain Van Hook's psycho-social history and its interrelation to the circumstances of the crime; (3) failing to provide sufficient lay witness testimony regarding Van Hook's childhood, upbringing, and family life; (4) failing to object to inadmissible evidence and thereby preserve reversible error; and (5) permitting the sentencer to consider, without objection, a presentence investigation report prepared the day before the sentencing hearing, which included sentencing recommendations of death.

Had trial counsel conducted a reasonable investigation, the sentencer would have learned, among other information, that:

> Van Hook's family history was "one of psychological disorders" which Van Hock probably inherited (Affidavit of Dr. Warren Richards M.D., Petitioner's App. 231a-32a);
>
> As a child, Van Hook was exposed directly to his parent's sexual conduct having observed the "primal scene" including sexual violence while sleeping in their bed. (Affidavit of Dr. James R. Eisenberg, Ph.D.);
>
> Van Hook began drinking at age 2, but not seriously until his father encouraged him to be a drinking companion by age 9. (Affidavit of Dr. James R. Eisenberg, Ph.D.);
>
> Alcoholism and drug abuse problems affected several generations of the family (Affidavit of Jay Salyers);

Van Hook's mother was committed to a psychiatric hospital when he was between four and five years old. (Affidavit of Robert Salyers, Petitioner's App. 227a);

Van Hook's parents would regularly beat him and yell profanities at him. (Affidiavit of Robert Salyers, Petitioner's App. 227a));

Van Hook and his siblings witnessed their father try to kill their mother several times (Affidavit of Tanna Waller, Petitioner's App. 232a));

When Van Hook was a child, his mother dropped him off at a bar where his father was performing as a musician telling the father "Hey, motherfucker, this is your child too." (Affidavit of Jack Whitson);

As a child, Van Hook's parents gave him almost total freedom to abuse legal and illegal drugs. (Affidavit of Dera Sweeney);

Van Hook made numerous suicide attempts. (Affidavit of Darlene Van Hook Whitson, Petitioner's App. 237a); and

Van Hook engaged in self-mutilating behavior. (Affidavit of Martha Van Hook).

These factors identify the pressures beyond normal human experience that contributed to the commission of the offense. Such evidence differs in strength and subject-matter from that actually presented at sentencing. With a complete social history, the sentencer would have been able to understand the etiology and manifestations of Van Hook's mental problems. Under this fact pattern, the court of appeals justifiably found that "while Van Hook's trial attorneys uncovered a little information about his traumatic childhood experience in their last minute investigation, many of the most important details were not discovered and therefore never presented to the sentencer." *Van Hook v. Anderson*, 560 F.3d at 528, Petitioner's App.9a).

Trial counsel advanced the position that Mr. Self somehow facilitated his own death and presented it as a mitigating factor under O.R.C. § 2929.03(B)(1). To establish that the victim induced or facilitated the offense, defense counsel called bartender Ron Light and Michael Ramsey, an acquaintance of Mr. Self, to testify that Self voluntarily left the bar with Van Hook. (Transcript). From that testimony, trial counsel argued Self facilitated his own death "when he agreed to let Mr. Van Hook come home with him for

what he thought was going to be some type of homosexual encounter." (Transcript). "[H]e took the chance that it might turn out the way it did in fact turn out. He's the one that assumed the risk in this particular situation" (Transcript). Such an argument was offensive. The state prosecutor said it best:

> I'm repulsed by the argument that this crime was a victim-induced crime. This crime was no more induced by David Self than a woman who is talking (sic) down the street induces herself to be raped. This caveman philosophy is repugnant to an orderly enlightened society.

(Transcript). The assumption of a lethal risk argument by defense counsel was ludicrous and damaged the credibility of the defense mitigation presentation. The sentencer found "absolutely no evidence whatsoever to suggest that David Self in any respect induced or facilitated the offense." (Sentencing Opinion). Trial counsels' actions affirmatively damaged the case for life.

During mitigation, even though the sentencer already rejected the insanity defense in the culpability phase, trial counsel called two mental health professionals, both of whom testified that Van Hook's various character disorders did not meet the legal definition of a mental disease or defect. (Testimony of Dr. Cooper; Testimony of Dr. Schimdtgoessling). Defense counsel further bolstered this conclusion by causing a report to be disseminated to the sentencer from Dr. Winter, who evaluated and prepared her evaluation in one day, opining that the offense was not a product of a mental disease or defect but was the product of a discharge of "primitive rage." (Presentence Mental Evaluation, Petitioner's App. 378a). This expert testimony made it pristinely clear that Van Hook could not establish the mitigating factor under O.R.C. § 2929.04(B)(3). The sentencing court found "absolutely no evidence that would suggest that the defendant suffered from a mental disease or defect." (Sentencing Opinion). Again, trial counsels' actions damaged the credibility of the mitigation presentation.

The failure to adequately present and prepare psychological testimony was prejudicial because mitigating expert psychological testimony was available to trial

counsel had they sought it. Trial counsel would have been in a position to show the sentencer that Van Hook did have a mental disease if they had obtained a mental health expert like Dr. Ryan (a summary of whose opinions are listed above in pages 6 and 7 of this Brief).

Likewise, Dr. Eisenberg, a psychologist with several years experience conducting evaluations for capital cases, states that the psychiatric and psychological evaluations conducted by the court's clinic, among other things, failed to address Van Hook's sexual development as it relates to ego-dystonic homosexuality. (Dr. Eisenberg Affidavit). The ego-dystonic diagnosis provides an explanation as to why Van Hook would lie to the police and tell them that his motivation was robbery as opposed his own deep-seated revulsion to his own homosexuality. Such information was available if counsel had acted timely and sought an independent evaluation.

Trial counsel did not argue that, although Van Hook's mental condition was shown by the experts who testified to not qualify as a mental disease or defect under O.R.C. § 2929.04(B)(3), his personality disorder could still be considered under Ohio's "catch-all"category of mitigation codified in O.R.C. § 2929.04(B)(7). Nor did the sentencer consider borderline personality under the (B)(7) "catch-all" category. (Sentencing Opinion). This meant that the mental health evidence was discounted entirely as a mitigating factor by the sentencer.

Trial counsel relied on the presentence investigation report (PSIR) to show that he lacked a significant prior criminal history as a mitigating factor under O.R.C. § 2929.04(B)(5). (Transcript). However, the presentence investigation report established that Van Hook had eleven prior instances of involvement with the juvenile and criminal justice system. (Transcript). Defense counsel's attempts to minimize Van Hook's prior record did not enhance the credibility of the mitigation case. The sentencing court noted:

> The record in this case, including exhibits offered by the defense and the testimony which the three judge panel has considered indicates that the

> defendant, Robert Van Hook, had numerous contacts with the law both as a juvenile and as an adult extending over a period of 14 years. Therefore the three judge panel would be precluded from giving the defendant consideration pursuant to mitigating factor number five.

(Sentencing Opinion).

Moreover, the introduction of the information contained in the PSIR was used to justify the death sentence. In its opinion sentencing Van Hook to death, the three-judge panel stated it considered the PSIR, which included the victim impact evidence, the testimony, other evidence, and the opinions of the doctors who evaluated Van Hook in concluding that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. (Sentencing Opinion). The panel's sentencing opinion indicated that it considered Van Hook's alleged lack of remorse; his prior criminal history; and his failure to testify under oath at the trial and mitigation phases as a part of their deliberations. (Sentencing Opinion).

If trial counsel had performed reasonably, the sentencer would have had information humanizing the defendant and militating against imposition of the death sentence, instead of incomplete information which led them to believe Van Hook deserved to die. The weighing process would not have been skewed by improper non-statutory aggravating circumstances. The sentencer would not have been influenced by the inflammatory victim impact statements, and their pleas for death. Instead, the sentencer would have weighed credible and meaningful lay and psychiatric testimony explaining forces in Van Hook's family history that contributed to a crime which otherwise appears horrible and senseless. They would also have weighed the testimony of Van Hook's siblings, aunts and uncles, who would have created empathy by putting a real face on the psychiatric testimony. The combined effect of counsel's errors resulted in the sentencer being unaware of mitigating aspects of Van Hook's background that would have supported a sentence less than death. Without these deficiencies in the performance of trial counsel, there is a reasonable probability that at least one of the sentencers would

have found the mitigating factors to outweigh the aggravating factors and prevented the imposition of the death penalty.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit followed the standard set forth in *Strickland* in granting Petitioner a new sentencing trial. For the reasons set forth above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

Keith A. Yeazel (Counsel of Record)
Attorney at Law
5354 North High Street
Columbus, Ohio 43214
(614) 885-2900

James D. Owen
Attorney at Law
5354 North High Street
Columbus, Ohio 43214
(614) 436-3245

Counsel for Respondent,
Robert J. Van Hook

NO. 09-144

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID BOBBY, WARDEN, Petitioner,

v.

ROBERT J. VAN HOOK, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROOF OF SERVICE

Keith A. Yeazel (Counsel of Record)
Attorney at Law
5354 North High Street
Columbus, Ohio 43214
(614) 885-2900

James D. Owen
Attorney at Law
5354 North High Street
Columbus, Ohio 43214
(614) 436-3245

Attorneys for Respondent, Robert J. Van Hook

RECEIVED
SEP - 2 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

I, Keith A. Yeazel, Attorney at Law, do swear or declare that on this date, August 29, 2009, as required by Supreme Court Rule 29 I have served the enclosed BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are:

Solicitor General of the United States, Room 5614, United States Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001;

Mr. Richard Cordray, Attorney General of Ohio, Benjamin C. Mizer, Solicitor General, David M. Lieberman, Deputy Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; and

Mr. Robert J. Van Hook, Respondent herein, 1339860, HCJC S51-A1, 900 Sycamore Street, Cincinnati, Ohio 45202.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on August 29, 2009.

Keith A. Yeazel
Attorney for Petitioner

KEITH A. YEAZEL
ATTORNEY AT LAW
5354 NORTH HIGH STREET
COLUMBUS, OHIO 43214
(614) 885-2900
FAX (614) 885-1900

August 29, 2009

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

RE: David Bobby, Warden
v. Robert J. Van Hook
No. 09-144

Dear Clerk:

Enclosed please find the original and 10 copies of Respondent, Robert J. Van Hook's:

Motion for Leave to Proceed IFP;

Brief in Opposition to Petition for Writ of Certiorari; and

Certificate of Service.

Please file these documents in the above-referenced action. Should there be any questions please contact me at your convenience.

Thank you for your assistance in this matter.

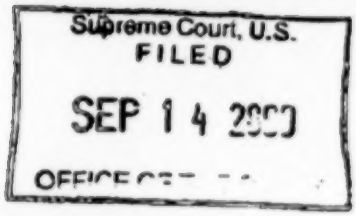
Very truly yours,

Keith A. Yeazel

/kay

RECEIVED
SEP - 2 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

REPLY BRIEF



(3)

No. 09-144

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

ROBERT J. VAN HOOK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY BRIEF OF THE PETITIONER 1

A. The Sixth Circuit reviewed counsel's performance using professional standards developed eighteen years later, in conflict with the approach of other circuits 1

1. Every other circuit to have considered the issue assesses attorney performance under prevailing professional norms 1

2. Counsel's preparation and penalty-phase performance were reasonable 3

3. Van Hook's remaining allegations of deficient performance have already been rejected by the Sixth Circuit en banc court 6

B. The Sixth Circuit mangled the *Strickland* prejudice inquiry 8

1. The court erroneously relaxed the prejudice standard 8

2. Van Hook has not established prejudice from his counsel's presentation of his childhood history .. 10

3. Van Hook has not shown prejudice from his counsel's presentation of the psychological evidence 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases **Page(s)**

Ake v. Oklahoma,
470 U.S. 68 (1985) 6

Cornwell v. Bradshaw,
559 F.3d 398 (6th Cir. 2009) 2

Dickerson v. Bagley,
453 F.3d 690 (6th Cir. 2006) 2

Gray v. Branker,
529 F.3d 220 (4th Cir. 2008) 2

Haliym v. Mitchell,
492 F.3d 680 (6th Cir. 2007) 2

Hamblin v. Mitchell,
354 F.3d 482 (6th Cir. 2003) 2, 3

Hill v. Mitchell,
400 F.3d 308 (6th Cir. 2005) 11

Hummel v. Rosemeyer,
564 F.3d 290 (3d Cir. 2009) 2

Keith v. Mitchell,
455 F.3d 662 (6th Cir. 2006) 7

Lundgren v. Mitchell,
440 F.3d 754 (6th Cir. 2006) 6

Rompilla v. Beard,
545 U.S. 374 (2005) 1

Sonnier v. Quarterman,
476 F.3d 349 (5th Cir. 2007) 2

State v. Esparza,
529 N.E.2d 192 (Ohio 1988) 6

State v. Hancock,
840 N.E.2d 1032 (Ohio 2006) 9

State v. Scott,
800 N.E.2d 1133 (Ohio 2004) 12

State v. Seiber,
564 N.E.2d 408 (Ohio 1990) 12

State v. Taylor,
676 N.E.2d 82 (Ohio 1997) 13

State v. Wilson,
659 N.E.2d 292 (Ohio 1996) 13

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

Summerlin v. Schriro,
427 F.3d 623 (9th Cir. 2005) (en banc) 2

Wiggins v. Smith,
539 U.S. 510 (2003) 2, 9

Williams v. Taylor,
529 U.S. 362 (2000) 2

Statutes and Rules

Ohio Rev. Code § 2929.024 6

Ohio Rev. Code § 2929.03 7

Ohio Rev. Code § 2929.04 ..... 12, 13

Ohio Rev. Code § 2945.39 7

Other Authorities

1 ABA Standards for Criminal Justice 4-4.1
(2d ed. 1980) 3

REPLY BRIEF OF THE PETITIONER

Respondent Robert J. Van Hook makes numerous assertions that counsel's performance was inadequate—assertions that are belied by the record or that the en banc Sixth Circuit dismissed. But he does not respond to the central issue raised in the Warden's Petition: the Sixth Circuit's well-established rule of reviewing counsel's performance under American Bar Association standards developed years after the trial. That rule conflicts with decisions by this Court and at least four other circuits. Van Hook does not deny that the Sixth Circuit stands alone in its approach. The Court should grant review to resolve the division of authority and correct the Sixth Circuit's distortion of *Strickland v. Washington*, 466 U.S. 668 (1984).

A. The Sixth Circuit reviewed counsel's performance using professional standards developed eighteen years later, in conflict with the approach of other circuits.

1. Every other circuit to have considered the issue assesses attorney performance under prevailing professional norms.

Van Hook concedes that counsel's conduct should be reviewed under "the professional standards that prevailed in Ohio at the time of Van Hook's trial" in 1985. (Opp. 2). This is consistent with *Strickland*, which instructs courts to evaluate counsel's conduct "under prevailing professional norms." 466 U.S. at 688. When this Court has conducted a *Strickland* inquiry, it has been fastidious in applying the ABA standards in effect at the time of the challenged conduct. See *Rompilla v.*

Beard, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

The Sixth Circuit has taken a different approach. In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), the court declared that the ABA standards "merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases." *Id.* at 487. It then applied the 2003 Guidelines to measure counsel's performance at a 1982 trial. *Id.* at 487-88.

The *Hamblin* rule is now entrenched in the Sixth Circuit's jurisprudence. See *Cornwell v. Bradshaw*, 559 F.3d 398, 407 (6th Cir. 2009); *Haliym v. Mitchell*, 492 F.3d 680, 716-17 (6th Cir. 2007); *Dickerson v. Bagley*, 453 F.3d 690, 693-94 (6th Cir. 2006). The decision here is just the latest example: The Sixth Circuit reviewed counsel's 1985 performance under the 2003 ABA Guidelines. App. 26a-28a.

This approach conflicts with the rule in other circuits. At least four other federal appeals courts identify the "clearly described" duties from "[t]he [ABA] standards in effect at the time of [the petitioner's] trial," and then evaluate defense counsel's performance by those lights. *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc); *Hummel v. Rosemeyer*, 564 F.3d 290, 298 (3d Cir. 2009); accord *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008); *Sonnier v. Quarterman*, 476 F.3d 349, 358 n.3 (5th Cir. 2007).

The problem with the Sixth Circuit's errant approach is that it eliminates any objective baseline by which to measure the adequacy of a defense lawyer's performance. In the words of *Strickland*, the *Hamblin* rule magnifies, rather than "eliminate[s,] the distorting effects of hindsight." 466 U.S. at 689.

This case provides a prime illustration. In 1985, the prevailing professional standards imposed a general duty on counsel "to explore all avenues leading to facts relevant to the merits of the case and the penalty." 1 ABA Standards for Criminal Justice 4-4.1, at p. 4-53 (2d ed. 1980). But the standards offered no guidance on how to approach a mitigation investigation or how to use penalty-phase experts. Yet the *Hamblin* rule has imposed a high burden on the Warden throughout this litigation to prove that counsel's 1985 mitigation investigation satisfied the 2003 ABA standards (which explicitly discuss those issues).

The Sixth Circuit stands alone in ignoring *Strickland*'s clear directive "to evaluate the conduct from counsel's perspective *at the time*," 466 U.S. at 689 (emphasis added). Van Hook does not deny this division of authority, nor does he defend the practice. The Warden therefore requests that the Court grant review to correct the Sixth Circuit's unfounded approach.

2. Counsel's preparation and penalty-phase performance were reasonable.

Disregarding the Warden's argument, Van Hook instead makes three factual allegations about his

counsel's performance. The record undermines all of them.

First, Van Hook inaccurately argues that counsel did not undertake a timely investigation of his background. (Opp. 3, 5). Billing records establish, however, that counsel's efforts began well in advance of trial. Counsel had frequent conversations with members of Van Hook's family, pursued Van Hook's military records, and consulted with court-appointed experts. App. 379a-387a.

Second, Van Hook claims that counsel called experts during the penalty phase who "contradicted [their] mitigation theory" (Opp. 4), but the record demonstrates otherwise. Counsel argued that, because of his personality disorder, Van Hook lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. J.A. 4562-67. Both experts advanced that theory.[1] Dr. Cooper testified that Van Hook "did not accurately perceive right from wrong because he had a perceptional distortion" at the time of the murder due to "the use of a variety of drugs and alcohol superimposed on [his] personality disorder." J.A. 4439. Dr. Schmidtgoessling testified that Van Hook "was substantially impaired at the time of this offense" due to his "borderline personality . . . and the influences of the substances." J.A. 4459.

---

[1] Van Hook further alleges that "[n]either doctor had a complete set of relevant records or Van Hook's complete psychosocial history" (Opp. 4), but he makes no attempt to identify those records.

Third, Van Hook contends that "defense counsel did not obtain Van Hook's military records or records regarding Van Hook's hospitalizations." (Opp. 4). To the contrary, the record establishes that counsel *did* obtain these records. Counsel reviewed Van Hook's military records on May 13, 1985, App. 380a, and the Veterans Administration sent counsel copies of the hospitalization records on July 1, 1985. J.A. 532.

Moreover, Van Hook's social history was well documented. Van Hook's father testified that his son started abusing alcohol and amphetamines at age 11 or 12, turning later to marijuana. App. 312a, 324a. Van Hook's mother described her son's desires to enlist in the Green Berets and the French Foreign Legion and his suicide attempts. App. 346a-353a. She also discussed Van Hook's sexual relationship with his uncle. App. 350a. Dr. Cooper observed that Van Hook had "an extensive drug history having abused alcohol, marijuana, PCP, LSD and a variety of pills." J.A. 2039. Dr. Winter discussed Van Hook's "early and continuing attachment to fantasies about war and the military," App. 371a-372a, and indicated that he "began sneaking sips from his parents drinks before he was three years old," App. 373a. She also documented his sexual-orientation confusion. App. 374a-376a.

In all, Van Hook complains that his counsel "failed to obtain and introduce . . . a wealth of mitigating evidence," (Opp. 4), but he has failed to identify a single document that counsel failed to uncover or a theme that went unmentioned.

3. Van Hook's remaining allegations of deficient performance have already been rejected by the Sixth Circuit en banc court.

Van Hook reargues a number of claims that were previously rejected in en banc proceedings. These allegations merit little attention.

First, Van Hook asserts that counsel were ineffective because they did not hire an independent mental health expert. (Opp. 5-7). He complains that his court-appointed examiners were non-party witnesses; they had no duty "to speak to defense counsel, explain their reports to defense counsel, or in any other way assist the defense." (Opp. 6). The Sixth Circuit panel granted relief on this claim, App. 31a-37a, but the en banc court reversed, returning the case to the panel with instructions to "delet[e] its discussion of counsel's failure to seek an independent mental health expert." App. 2a.

The en banc court took this action because Van Hook's claim has no merit. Under the Constitution, the State need only ensure "that a competent expert be made available." *Lundgren v. Mitchell*, 440 F.3d 754, 772 (6th Cir. 2006) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)). The defendant has no right "to retain the expert of his choosing." *Id.* The Ohio Supreme Court has likewise stated that defendants have no right to retain an independent psychiatrist or psychologist. Although the trial court may approve funding for such an expert under Ohio Rev. Code § 2929.024, that decision rests "within its sound discretion." *State v. Esparza*, 529 N.E.2d 192, 196 (Ohio 1988). Given the lack of a constitutional or statutory right, counsel were not deficient in failing

to ask the trial court for a discretionary appointment here. After all, the court had already appointed three experts to "evaluat[e] . . . the defendant's mental condition at the time of the commission of the offense," Ohio Rev. Code § 2945.39(A) (1981), and it had just approved counsel's request for extra funding to allow depositions of Florida law enforcement officials in connection with Van Hook's *Miranda* claim, J.A. 376, 378.

Second, Van Hook declares that counsel were ineffective because they acceded to the preparation of a presentence report. The Sixth Circuit panel granted habeas relief on this claim, App. 37a-40a, but the en banc court reversed, ordering the panel to "delet[e] its discussion of . . . the failure of counsel to object to the Presentence Report." App. 2a.

It is easy to see why. Under Ohio Rev. Code § 2929.03(D)(1), defense counsel has the option of requesting a presentence report. Because the report is distributed to both parties, the decision entails risks and benefits. In this case, the report helpfully relayed Van Hook's suicide attempts and his early introduction to alcohol, J.A. 5563-64, but it also contained an inadmissible victim impact statement, J.A. 5567-68.[2] In any event, the Sixth Circuit had already acknowledged that the decision to request a report, and the accompanying cost-benefit calculus, is vested with trial counsel. See *Keith v. Mitchell*, 455 F.3d 662, 671 (6th Cir. 2006).

---

[2] Because Van Hook was tried before a three-judge panel and not a jury, there is a presumption that the inclusion of such statements was harmless. See *State v. Post*, 513 N.E.2d 754, 759 (Ohio 1987).

Third, Van Hook complains that counsel was ineffective for agreeing to a mental evaluation by Dr. Winters. (Opp. 10). Just as above, this decision is vested with trial counsel. And counsel's decision here was reasonable. Dr. Winter documented Van Hook's horrific childhood, his father's violent acts and alcohol abuse, his own substance abuse and fascination with the military, and his attempts at suicide and self-mutilation. App. 369a-374a. All these findings advanced counsel's mitigation presentation.

Counsel had a mere three months between the indictment and the trial. They obtained Van Hook's military records, they interviewed family members, they consulted with the court-appointed experts, and they presented an accurate picture of Van Hook's childhood and psychological profile. Under the professional standards at the time of trial, this performance was reasonable.

B. The Sixth Circuit mangled the *Strickland* prejudice inquiry.

1. The court erroneously relaxed the prejudice standard.

The Sixth Circuit did further violence to *Strickland* by conducting an artificial prejudice inquiry. The court identified three pieces of evidence that counsel purportedly failed to present; it announced that "[t]he threshold for finding prejudice in this case is . . . lower" because the murder implicated only one statutory aggravating circumstance; and it then held that "there [was] a reasonable probability that the result of his

sentencing proceeding would have been different." App. 13a-14a.

This number-of-aggravators analysis bears no resemblance to a proper prejudice inquiry, which "*reweigh[s]* the evidence in aggravating against the totality of available mitigation evidence." *Wiggins*, 539 U.S. at 534 (emphasis added).

The Sixth Circuit did not even mention the strong aggravating circumstance in this case—Van Hook's luring of the victim under the pretenses of sex in order to rob him. Moreover, under Ohio law, the sentencer "'may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.'" *State v. Hancock*, 840 N.E.2d 1032, 1054 (Ohio 2006) (citation omitted). Yet the Sixth Circuit's analysis makes no reference to the heinous nature of the offense. Van Hook invited the victim to perform oral sex on him, and then he strangled, decapitated, and mutilated the victim.

By disregarding the aggravating facts, the Sixth Circuit transformed the *Strickland* prejudice inquiry into a superficial hurdle. If the murder implicates only one statutory aggravating circumstance, the petitioner need only identify some piece of unpresented evidence to show prejudice. The Warden requests that the Court accept review and restore the standard to its proper form.

2. Van Hook has not established prejudice from his counsel's presentation of his childhood history.

Van Hook provides a list of facts that were purportedly unknown to the three-judge panel. (Opp. 12-13). The record shows otherwise:

- Van Hook's mother testified that she was treated for depression and suicidal thoughts. App. 340a.
- Dr. Winter indicated that Van Hook was exposed to his parents' sexual violence. App. 371a.
- Van Hook's father testified that he and his son abused drugs and alcohol. App. 312a. This was documented by Dr. Cooper and Dr. Winter. App. 373a; J.A. 2039.
- Both of Van Hook's parents admitted to their drug and alcohol addictions, App. 310a, 340a, which Van Hook's aunt confirmed, App. 358a.
- Van Hook's father admitted to one occasion where he "slapped the hell" out of his son, App. 321a; his mother testified that she received weekly beatings, App. 338a; and his aunt testified that both parents fought constantly, App. 358a-362a. Dr. Winter described Van Hook's childhood as a "combat zone." App. 371a.
- Van Hook's father admitted that he took Van Hook as a child, staying out until 3 a.m. App. 311a-312a.

- Van Hook's parents and Dr. Winter discussed Van Hook's suicide attempts and acts of self-mutilation. App. 325a-327a, 351a-353a, 369a-370a.
- Dr. Winter found that Van Hook was "the product of an unstable, non-nurturant, violent, and chaotic background . . . characterized by inadequate parental care due to absence and/or unavailability of the mother because of drinking, repeated abandonment by her, exposure to physical and sexual violence, and exposure to substance abuse." App. 377a. Those factors, she concluded "preclude[d] the development of a healthy, normal personality." *Id.*

Given this record, Van Hook cannot substantiate his claim that "the most important details" of his childhood were "never presented to the sentencer." (Opp. 13). Although Van Hook mentions affidavits from his aunts, uncles, and stepsister, he has not explained how their statements "differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). Rather, as the Ohio court of appeals found, the statements are cumulative of the penalty-phase evidence and, therefore, insufficient to establish prejudice. App. 218a-219a.

3. Van Hook has not shown prejudice from his counsel's presentation of the psychological evidence.

As discussed above, Dr. Cooper and Dr. Schmidtgoessling testified that Van Hook's

borderline personality disorder, combined with drugs and alcohol, impaired Van Hook's judgment on the night of the murders. Dr. Winter reached the same diagnosis. App. 377a. Nevertheless, all three experts testified that a borderline personality was not a "mental disease or defect." App. 377a; J.A. 4444, 4459.

Van Hook claims prejudice in three respects. First, he notes that the experts' testimony precluded any mitigation argument under Ohio Rev. Code § 2929.04(B)(3) (1981) ("Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."). A reasonable attorney, Van Hook contends, "would have been in a position to show the sentencer that [he] did have a mental disease." (Opp. 15).

This argument is without merit. Even if another attorney could have elicited such testimony, there is not a reasonable likelihood that the three-judge panel would have accepted that view. The Ohio Supreme Court has determined that "personality disorder[s] do[] not constitute a 'mental disease or defect' within the meaning of R.C. 2929.04(B)(3)." *State v. Seiber*, 564 N.E.2d 408, 415 (Ohio 1990); accord *State v. Scott*, 800 N.E.2d 1133, 1150-51 (Ohio 2004).

Second, Van Hook argues that a reasonable attorney would have pursued a mitigation argument of "homophobic panic." (Opp. 7, 15). To the contrary, the court-appointed experts documented this condition. Dr. Schmidtgoessling listed "homosexual panic" as one of her two possible diagnoses. J.A.

5555. Dr. Winter reached a similar conclusion: "[T]he client found himself interested in, and tempted to have a sexual relationship with Mr. Self." App. 376a. According to Dr. Winter, "[t]his may have precipitated a homosexual panic, together with an enraged and murderous response to having these 'disgraceful' feelings arise in him." *Id.* Put simply, this theory was presented to the three-judge panel without success. Van Hook has not demonstrated that a different psychiatrist's testimony would have yielded a different result.

Finally, Van Hook suggests that a competent attorney would have argued that "his personality disorder could still be considered under Ohio's 'catch-all' category of mitigation" in Ohio Rev. Code § 2929.04(B)(7). (Opp. 15). This argument, too, is unpersuasive. The Ohio Supreme Court has stated that "[p]ersonality disorders are often accorded little weight because they are so common in murder cases." *State v. Wilson*, 659 N.E.2d 292, 310 (Ohio 1996); accord *State v. Taylor*, 676 N.E.2d 82, 98 (Ohio 1997). Van Hook has not explained why his condition was deserving of exceptional weight under Ohio law.

In all, counsel painted a complete picture of Van Hook's childhood and his personality disorder. Van Hook has demonstrated only that counsel could have presented more evidence, not different or better evidence. This is not "sufficient" under *Strickland* "to undermine confidence in the outcome." 466 U.S. at 694.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

September 14, 2009